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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

LUCKY STORES, INC.,
Petitioner,

vs.

RICHARD HOLIHAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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69 pp

QUESTION PRESENTED

Should an employer be subject to suit under the ADA for referring an employee to an employee assistance program for problems later attributed to work-related stress?

STATEMENT REQUIRED BY RULE 29.6

The names of all parties in the court below appear in the caption of the case. Lucky Stores, Inc., a Delaware corporation ('Lucky" or "Petitioner"), is a wholly owned subsidiary of American Food and Drug, Inc., a Delaware corporation (AFDI). AFDI is a wholly owned subsidiary of American Stores Company, a Delaware corporation (ASC). Lucky has the following subsidiaries: Advantage Stores, Inc.; Alidamorth, Inc.; Cal-Pharm, Inc.; Food Basket, Inc.; Gemco Stores, Inc.; Hodisco, Inc.; Jim Dandy Markets, Inc.; LKS Manufacturing, Inc.; LS Holdings, Inc.; Lucky Stores, Inc., a California corporation; Lucky Stores, Inc., a Florida corporation; Lucky Stores, Inc., a Nevada corporation; Lucky Stores Properties, Inc.; Magnamart, Inc.; Ordisco, Inc.; Scolari's Stores, Inc.; and Shortco, Inc.

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No. _____

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October Term, 1996

LUCKY STORES, INC.,

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v.

RICHARD HOLIHAN,

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Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 87 F.3d 362 (9th Cir. 1996), and is reproduced in the Appendix to this Petition. (Appendix A).

JURISDICTION

The judgment of the Court of Appeals was entered on June 26, 1996. Petitioner filed a timely Petition for Rehearing with suggestion for rehearing en banc on July 10, 1996. The Petition was denied in an Order dated August 7, 1996, which is reproduced in the Appendix. (Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq., governs this case. 42 U.S.C. § 12102(2) provides:

The term "disability" means, with respect to an individual -

(a) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(b) A record of such an impairment; or

(c) Being regarded as having such an impairment.

STATEMENT OF THE CASE

Richard Holihan sued Lucky Stores, Inc. (hereinafter "Lucky") in the United States District Court for the Central District of California on May 7, 1994, alleging employment discrimination in violation of the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. Holihan claimed that Lucky had discriminated against him on the basis of his alleged disability when it terminated his employment in accordance with its leave of absence policy. Lucky's longstanding policy allows certain employees to take up to six months' continuous leave for any reason. An employee who remains on leave past the policy's six-month maximum, however, is subject to termination.

Holihan began working for Lucky in 1966 and became a store manager in 1976. From then until 1992, he managed eight different stores with no significant performance problems. Holihan's performance as a store manager started to decline in April of 1992. Holihan's supervisors began receiving reports from his subordinates that he had been publicly berating store workers and swearing at them. On one occasion Holihan grabbed a subordinate's shirt, pulled him by the tie, and told him to "shut up." He then told the subordinate "to be in a better mood the next day or [Holihan] would have to get rid of him."

Lucky investigated the numerous complaints lodged against Holihan. On July 30, 1992, Holihan's immediate supervisor, district manager Mark Church, and grocery supervisor Gary Doone met with Holihan. Church asked Holihan if he was having any "problems." Holihan replied that he had no problems whatsoever. Following Lucky's investigation, Holihan was transferred to another store.

During Holihan's first 85 days at the new store, Church received over 50 documented complaints lodged against Holihan by at least 13 different subordinates, including members of the store's managerial staff. These complaints included publicly yelling at employees; throwing bread off shelves in front of customers when he became upset with a bread clerk; and publicly threatening the assistant manager with the loss of his job and blaming him for all of the store's problems.

On October 22, 1992, a meeting was convened to discuss these new complaints. Church, Holihan, and Lucky South Division Operations Vice President Jim Horsley attended the meeting. At the meeting's conclusion, Church offered Holihan a choice: (1) an unpaid suspension pending Lucky's investigation of the allegations against him; or (2) contacting Lucky's Employee Assistance Program ("EAP"). Holihan elected to contact the EAP.

After contacting the EAP, Holihan began a voluntary medical leave of absence on October 26, 1992. Although his first leave of absence was scheduled to end on

February 1, 1993, he thereafter presented Lucky with repeated notes from his doctors extending his absence from work. Holihan never presented Lucky with a doctor's note or report stating that he was permanently disabled from working or that he suffered from any physical or mental impairment which substantially limited any other major life activity. Doctors' reports received by Lucky indicated only that Holihan was stressed and depressed from work.

On May 15, 1993, more than six months into his leave, Holihan gave Lucky a note stating he would not return to work until July 1, 1993. On May 28, 1993, Lucky's Human Resources Department notified Holihan that he was being terminated pursuant to Lucky's leave policy. On September 1, 1993, Holihan reapplied for work at Lucky. Lucky's Vice President of Human Resources, David Hauk, correctly informed Holihan that Lucky had no manager or assistant manager openings at that time. Hauk then offered Holihan the highest available position within Lucky for which he was qualified -- journeyman clerk -- with the chance to apply for a store manager position when one became available. Holihan rejected this offer.

On May 27, 1994, Holihan filed a complaint in the United States District Court for the Central District of California alleging violation of the ADA. During his deposition, Holihan admitted that he was not and had never been disabled, and that he had fully recovered from his alleged "stress" problem as of August 1993. He further admitted that no one had ever told him he had a mental

disability. The District Court granted Lucky's summary judgment motion, ruling that Holihan did not have a disability within the meaning of the ADA, and that he had not proffered sufficient evidence to show that Lucky had "regarded" him as disabled.

On June 26, 1996, the Ninth Circuit reversed the District Court's order granting summary judgment for Lucky. The Ninth Circuit agreed with the District Court that Holihan was not actually disabled but determined that a reasonable jury could infer Lucky had regarded him as disabled within the meaning of the ADA. 87 F.3d at 366.

REASONS FOR GRANTING THE WRIT

This case presents the important recurring question of what action by an employer can trigger a finding that the employer regarded an employee as having a disability under the ADA or the Rehabilitation Act of 1973 ("Rehabilitation Act"). 29 U.S.C. §701 *et seq.* Specifically, this case raises the question of whether referring an employee to an EAP for problems later attributed to work-related stress should subject an employer to suit under the ADA's "regarded as" definition of "disability." To the extent it might conceivably be reconciled with decisions from other circuits, the Ninth Circuit's opinion rests solely and squarely on the fact that Lucky referred Holihan to an EAP. Thus, the effect of the Ninth Circuit's decision will be to stop employers from enabling employees to obtain EAP and other counseling --

a devastating consequence which ought not be allowed to stand.

The Ninth Circuit's analysis conflicts with that of seven other circuits because it ignores the statutory phrase "substantially limits," which modifies the term "impairment." Other circuits have rightly held that an employee cannot be "regarded as" disabled unless the employer regards him as being not only *impaired*, but also *substantially limited* as to one or more major life activities. Here, by contrast, the Ninth Circuit held that because Lucky viewed Holihan as impaired (Lucky knew he had problems and was stressed from work), it may have *ipso facto* regarded him as disabled. The Ninth Circuit's failure to apply the ADA's "substantially limits" language is both incorrect and in conflict with decisions from seven other circuits.

As for Lucky's referral of Holihan to an EAP, the Ninth Circuit appears to say that because Lucky viewed Holihan as unable to continue as Store Manager (when it told him in October 1992 to contact the EAP or be suspended), it regarded him as disabled *vis-a-vis* the major life activity of working. 87 F.3d at 366. Other circuits, however, have rightly held that regarding someone as unable to perform a particular job is not the same as regarding that individual as "substantially limited" in the major life activity of working. With respect to that activity, the Equal Employment Opportunity Commission ("EEOC") has defined the term "substantially limits" to

mean: "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes." 29 C.F.R. § 1630.2(j)(3)(i). Thus, the Ninth Circuit's decision conflicts both with other circuits' holdings and with the EEOC regulations, all of which (except the Ninth Circuit) recognize that being regarded as unable to do a particular job does not constitute being regarded as disabled.

The Ninth Circuit's opinion further conflicts with other circuits by signaling that knowledge of job-related stress is enough to impute to the employer a perception that the employee is disabled. Other courts have held that job-related stress is not a "substantially limiting" impairment under the ADA. It follows that an employer's knowledge of job-related stress is insufficient to trigger "regarded as" liability under the ADA.

Lastly and most importantly, under the Ninth Circuit's view of "regarded as" liability, any employer who suggests that an employee seek EAP or other counseling faces potential ADA liability if that employee ultimately suffers an adverse employment action. The Ninth Circuit's opinion threatens the future of employee assistance programs, at least within that circuit and perhaps across the country, by discouraging employers from helping employees experiencing personal difficulties (which may or may not involve disabilities) for fear that they will be held to have "regarded" such employees as disabled. The future of helpful, socially responsible and confidential EAP

programs is at risk. Working men and women in need of counseling or other services will be deprived of assistance because employers will be afraid to refer them for help. Personal crises will go unaddressed, and domestic or workplace violence may occur where they otherwise would not. In sum, laudable employee assistance efforts will be gutted unless the Ninth Circuit's decision is reversed.

This Court has not issued any opinion regarding the ADA since the statute's enactment, nor has the Court ever issued an opinion on the "regarded as" issue under the Rehabilitation Act.[1] The Ninth Circuit's opinion clearly poses the above-described conflict in the circuits, as well as an immediate risk to the nation's EAP programs. Guidance by this Court concerning the ADA in general, and ADA "regarded as" liability in particular, is critical at

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[1] The Court has addressed the "regarded as" issue in *dicta*. In School Board of Nassau County v. Arline, 480 U.S. 273, 289 (1987), the Court observed: "By amending the definition of handicapped individual [in Section 504 of the Rehabilitation Act in 1974] to include not only those who are actually physically impaired, but also those who are regarded as impaired and who, as a result, are substantially limited in a major life activity, Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from the actual impairment." (Internal quotations omitted.)

this juncture because of the immediate threat posed by the Ninth Circuit's decision to EAP programs and the employees served thereby.

I.

THE NINTH CIRCUIT'S OPINION SIGNIFIES A CLEAR AND PROFOUND SPLIT WITH OTHER CIRCUITS AS TO WHEN AN EMPLOYER CAN REASONABLY BE FOUND TO HAVE REGARDED AN EMPLOYEE AS DISABLED UNDER THE ADA.

Under the ADA, the term "disability" means, with respect to an individual:

- A physical or mental impairment that substantially limits one or more of the major life activities of such individual;

- A record of such impairment; or

- Being regarded as having such an impairment.

The EEOC further defines being "regarded as having" a disability to include persons who have "a physical or mental impairment [which] substantially limits major life activities only as a result of the attitudes of others toward

such impairment." 29 C.F.R. § 1630.2(a)(2).[2] As recognized by the EEOC, Congress intended the "regarded as" part of the definition of "disability" to protect persons from a range of discriminatory actions based on myths, fears and stereotypes about disability. 1 EEOC Technical Assistance Manual ("EEOC TAM") § 2.2(c), reprinted in ADA Manual BNA § 90:0152 (1992).

A recent Fourth Circuit opinion exemplifies what Congress intended by the "regarded as" prong of the ADA's definition of disability. In Runnebaum v. NationsBank of Maryland, 95 F. 3d 1285 (4th Cir. 1996), the court held that an asymptomatic carrier of the HIV virus stated a claim under the ADA "regarded as" analysis. The court noted a supervisor's deposition testimony that he felt "panicky" and "uncontrolled," and that he believed the plaintiff's death from AIDS might be imminent. The court found a genuine issue of material fact as to whether the employer regarded the plaintiff as having an impairment

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[2] See also Wooten v. Farmland Foods, 58 F.3d 382, 385-86 (8th Cir. 1995) (citing School Board of Nassau County v. Arline, 480 U.S. 273, 279 (1987)) ("A person is 'regarded as having' an impairment that substantially limits the person's major life activities when other people treat that person as having a substantially limiting impairment. The focus is on the impairment's effect upon the attitudes of others. This provision is intended to combat the effects of archaic attitudes, erroneous perceptions, and myths about work to the disadvantage of persons with or regarded as having disabilities."). (Internal citations omitted.)

which "substantially limits" a major life activity. Id., at 1297.

The Ninth Circuit's opinion deviates from Runnebaum in that it utterly fails to examine whether Lucky regarded Holihan as being *substantially limited* in a major life activity. The court did correctly note that the only major life activity at issue herein is "working." 87 F.3d at 366. Thus, like the plaintiff in Runnebaum, Holihan had to demonstrate that Lucky regarded him as being substantially limited in his ability to work. The Ninth Circuit, however, simply skipped the "substantially limits" step of ADA "regarded as" analysis.

Lucky knew only the following about Holihan's condition:

- At a meeting between Holihan and Lucky management in July, 1992, district manager Mark Church asked Holihan if he was having any "problems"; Holihan said he had none.

- At another meeting in October 1992, Church encouraged Holihan to seek counseling through Lucky's EAP or be placed on an unpaid suspension.

- Several doctors reported diagnosing Holihan with work-related stress and depression.

In dispensing with the requirement that Holihan show that Lucky perceived him as substantially limited in working, the Ninth Circuit's decision plainly conflicts with the other circuits which have addressed this issue. Those circuits have held that an employer's perception of an impairment alone cannot, of itself, constitute a perception of disability. In Daley v. Koch, 892 F.2d 212 (2d Cir. 1989), for example, the Second Circuit held that rejecting a police candidate based on a doctor's report indicating "poor judgment, irresponsible behavior, and poor impulse control" does not give rise to a claim for disability discrimination under the Rehabilitation Act. The court observed:

> This court holds 'poor judgment, irresponsible behavior and poor impulse control' do not amount to a mental condition that Congress intended to be considered an impairment which substantially limits a major life activity and therefore a person having those traits or perceived as having those traits cannot be considered a handicapped person within the meaning of the act. If appellant had been perceived by the Police Department to be suffering from an impairment which substantially limits a major life activity, whether or not in reality he

> had no impairment, then he might qualify for a relief under the Rehabilitation Act. However, it is clear from the facts that the Police Department never considered appellant to be suffering from an impairment which substantially limits a major life activity.

Id. at 215.

Nowhere did the Ninth Circuit analyze whether these facts showed that Lucky considered Holihan to be suffering from a *substantially limiting* impairment.

In Kocsis v. Multi-Care Management, 1996 WL 587859 (6th Cir. 1996), the Sixth Circuit recognized that the ADA's "regarded as" prong requires a plaintiff to "show that the perceived impairment is a substantial limitation on a major life activity." Id., at *8 (internal citations omitted). Kocsis was a registered nurse who alleged she had been demoted in violation of the ADA. The court observed that "Kocsis' performance evaluations reveal that the attendant, her supervisor, was aware of her health problems, lack of energy and mood swings. While the defendant may have perceived that Kocsis' health problems were adversely affecting her job performance, there is no evidence that defendant regarded Kocsis as being unable to care for herself or to perform all of the duties of her job." Id.

In Kelly v. Drexel University, 94 F.3d 102 (3d Cir. 1996), the Third Circuit held that an employee who limped from a hip injury had failed to show he was "regarded as" disabled by his employer. "The mere fact that an employer is aware of an employee's *impairment* is insufficient to demonstrate either that the employer regarded the employee as disabled or that the perception caused the adverse employment action." Id. at 109 (emphasis added). The Ninth Circuit, by contrast, relied precisely on Lucky's awareness of some vague impairment and the EAP referral.[3]

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[3] Decisions from the Fifth and Eighth Circuit Courts of Appeals also conflict with the Ninth Circuit's decision in this case. In Ellison v. Software Spectrum, Inc., 85 F. 3d 187, 192-93 (5th Cir. 1996), the Fifth Circuit held that an employer was not liable under the ADA's "regarded as" prong where an employee who had recently recovered from breast cancer surgery was terminated during a reduction-in-force. The court found no material fact issue as to whether the company had regarded Ellison as having a substantially limiting impairment, even though her supervisor suggested that she get a lumpectomy, made jokes about her cancer, and mentioned it during employee meetings. In Aucutt v. Six Flags, 85 F.3d 1311 (8th Cir. 1996), the Eighth Circuit held that the employer's awareness of an employee's medical problems did not mean the employer regarded the employee as disabled. Aucutt was terminated as part of a reduction-in-force. The employer (Six Flags) knew of Aucutt's medical problems -- angina, high blood pressure, and coronary artery disease -- and his inability to navigate a mandatory employee obstacle course without severe pain. Id. at 1319. The court stated: "the fact that Six Flags was aware of his medical problems is insufficient to establish that Six Flags 'regarded' him as disabled." Id. at 1320.

The Seventh Circuit properly considered the statute's "substantially limits" language in Stewart v. County of Brown, 86 F.3d 107 (7th Cir. 1996). There, a deputy sheriff began suffering from stress, induced both by the pressures of his job and the fact that he ran a full-time business on the side. In May 1988, he underwent a complete physical and, like Holihan, was diagnosed as depressed. He was similarly diagnosed nine months later and, like Holihan, went on leave from work, informing his supervisor in February 1989 that he was being treated by a psychologist. Id. The next month, the deputy's doctor concluded that he could return to his job. His supervisor, however, told him to undergo further psychological testing before returning to work. Id. The deputy (Stewart) was eventually returned to his position but was soon charged with violating department rules regarding excessive use of force. Id. The sheriff's department decided to terminate Stewart, but later reassigned him to a courthouse security position after an arbitrator had reduced the termination to a 30-day suspension. Id. Stewart sued under the ADA and Rehabilitation Act. The Seventh Circuit affirmed summary judgment in favor of the sheriff's department, holding as a matter of law that there was no perception of a mental impairment substantially limiting one or more major life activities, even though (1) Stewart suffered from workplace stress/depression, (2) his supervisor called him "excitable," (3) the supervisor ordered a number of psychological evaluations for him, and (4) the supervisor told third persons that he considered Stewart to be emotionally or psychologically imbalanced. Id. at 111.

The above-cited cases directly conflict with the Ninth Circuit's decision, which holds in effect that knowledge of a mere impairment, no matter how insignificant, plus referral to an EAP can establish "regarded as" liability under the ADA. The Ninth Circuit's failure to consider whether Lucky regarded Holihan as being *substantially limited* in a major life activity is a significant departure from the approach of the other circuits in similar cases. This Court should examine and correct this incongruity.[4]

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[4] The Ninth Circuit's analysis also conflicts with the important principle that an employer cannot be liable under the ADA where it lacks knowledge of a substantially limiting impairment. For example, in Simpkins v. Specialty Envelope, Inc., 1996 WL 452858 (6th Cir. 1996) (attached hereto pursuant to 6th Cir. Rule 24(c)), the court held that "an employer who discharges an employee without knowledge of the employee's disability is not liable" under the ADA. Id., at *5. (Appendix C). Simpkins' employer clearly knew she had an impairment: after a meeting to discuss "problems" with her performance, she was observed beating on the bathroom walls and then running through the building "stuffing tissues in her mouth to keep from screaming." Id., at *1. The next day, Simpkins' husband called the company and said "his wife had been hospitalized and would be unable to work for several days." Id., at *2. The Eighth Circuit affirmed summary judgment for the employer (Specialty) because Simpkins "never told anyone at Specialty she was suffering from a disability or that a doctor had diagnosed her as having had a *major* depressive episode." Id., at *2 (emphasis added). Although addressing the employer's lack of knowledge (instead of employing "regarded as" analysis), the court concluded that knowledge of an impairment alone is insufficient; the impairment must substantially limit a major life activity. Id., at *6. With respect to the employer lacking knowledge of

The Ninth Circuit's decision further conflicts with those of at least the Eighth, Tenth, Fifth and Eleventh Circuits inasmuch as the Ninth Circuit effectively held that Lucky may have regarded Holihan as disabled based on his inability to perform a single position. In Wooten, supra, the Eighth Circuit analyzed the ADA's "regarded as" prong as it relates to the major life activity of working. Wooten was terminated after having provided his employer (Farmland) with a doctor's note restricting him from working with meat products, working in a cold environment, and lifting over 20 pounds. 58 F.3d at 384. In affirming summary judgment for Farmland, the Eighth Circuit noted that even if Farmland had believed Wooten's restrictions to be permanent, the restrictions against working with meat products in a cold environment would not substantially limit Wooten's major life activities: "Working does not mean working at a particular job of that

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a disability, see also Taylor v. Principal Financial Group, Inc., 93 F.3d 155, 164 (5th Cir. 1996) (employer lacked knowledge of alleged mental disability even though employee told supervisor he had been diagnosed with bipolar disorder; "The evidence does not show that Taylor ever told Matthews [the supervisor] that he suffered a limitation as a result of his alleged impairment."); Miller v. Nat'l Casualty Co., 61 F.3d 627, 630 (8th Cir. 1995) (sister's statements that employee was "falling apart" not enough to alert "the company to the fact that Miller suffered from a mental disability that the ADA would require the company to accommodate."); Hedberg v. Indiana Bell Telephone Co., Inc., 47 F.3d 928 (7th Cir. 1995).

person's choice." Id. at 386 (internal quotations omitted).[5] In the instant case, when Lucky encouraged Holihan to visit the EAP, it at most regarded him as unable to perform his Store Manager job. By relying on the EAP referral to find that Lucky regarded Holihan as disabled, the Ninth Circuit in effect held that viewing an employee as unable to perform his own job is the same as "regarding" the employee as disabled.[6]

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[5] Here, no evidence suggests that Lucky regarded Holihan as *permanently* impaired. Temporary impairments are not substantially limiting and, therefore, are not disabilities under the ADA. See 29 C.F.R. § 1630.2(j); EEOC TAM § 2.2(a)(iii). See also Evans v. Dallas, 861 F.2d 846 (5th Cir. 1988) (plaintiff not handicapped under Rehabilitation Act where injury not "an impairment of a permanent nature"). If the employer regards an employee as temporarily impaired, he is not regarding the employee as disabled. In this case, Holihan had worked at Lucky for over 20 years with no significant performance problems. Given that history, Lucky could only have viewed Holihan's problems in 1992 as temporary, which was confirmed in September 1993 when he reapplied for work and was offered a position.

[6] In McDonald v. Delta Air Lines, Inc., 94 F.3d 1437 (10th Cir. 1996), an airline mechanic asserted that Delta's knowledge of his cataract problem evidenced the fact that it "regarded" him as disabled. Id. at 1445. The Tenth Circuit, however, observed that Delta's only employment action as a result of such knowledge was to disallow McDonald from taxiing aircraft. Id. The court further observed that taxiing aircraft is neither a class of jobs nor a broad range of jobs in various classes, but is instead "a single, particular job." Id. See also Chandler v. City of Dallas, 2 F.3d 1385 (5th Cir. 1993) (employer who viewed vision-impaired employee as unable to perform driving job did not regard employee as substantially limited in major life activity of

It is true that after referring Holihan to its EAP, Lucky received notes from Holihan's doctors indicating he was suffering from work-related stress and general depression. But to the extent the Ninth Circuit's decision hinges on those notes, it conflicts with opinions holding that stress and depression disorders are not disabilities under the ADA because they are not substantially limiting impairments. See, e.g., Pritchard, supra, Cadelli v. Fort Smith School Dist., 852 F. Supp. 789, 796-97 (W.D. Ark. 1993), aff'd on other grounds, 23 F.3d 1295 (8th Cir. 1994); Margeson v. Springfield Terminal Ry. Co., 1993 WL 343676 (D. Mass. 1993), aff'd without op., 32 F.3d 561 (1st Cir. 1994). If these conditions themselves are not disabilities, then Lucky's knowledge that Holihan was experiencing these or similar conditions does not make him "disabled" under the ADA. Rather, Lucky viewed Holihan as what he was -- stressed out. If being stressed out is not a disability under the ADA, then regarding an employee as stressed out is not regarding him as disabled as a matter of law.

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working); Pritchard v. Southern Co. Services, 92 F.3d 1130, 1133 (depression itself does not constitute a disability under ADA; employee whose depression only prevented him from working in a nuclear plant held not substantially limited in the major life activity of working).

II.

THE NINTH CIRCUIT'S DECISION THREATENS THE NATION'S EMPLOYEE ASSISTANCE PROGRAMS.

The Ninth Circuit's decision means that employers who refer employees to EAPs risk ADA liability under "regarded as" analysis. The effect of this deviant ruling will be to discourage employers from taking positive, proactive steps to address employee "problems" before they become personal and/or workplace crises.

This Court recognized in June that the "public interest [is] served by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance." Jaffee v. Redmond, 116 S. Ct. 1923, 1929 (1996) (adopting psychotherapist-patient privilege and extending it to social workers). A recent study on changes in the modern workplace found that problems in employees' personal lives caused by their current job were the single most potent off-the-job stressor. Mary Murch & John Kamp, *American Workers Under Pressure: Why EAPs are a Valuable Commodity*, EAPA Exchange 20-21 (June 1995).

EAPs are now widely recognized as a powerful means for helping maintain the nation's mental health. In a

recent study of the federal court system's EPA, it was found that:

> In 42 percent of the cases, the EAP assessed mental health problems such as stress, depression, and anxiety. The EAP assessed marital or other relationship issues as the primary problem in 23 percent of the cases. Other family issues such as parenting were identified as the primary problem in 16 percent of the cases. Job issues were assessed as the primary problem in 12 percent of the cases. Substance abuse was assessed as the primary problem in 2 percent of the cases.

Ernest Hardaway et al., *The Employee Assistance Program: Help for Court Managers and Employees*, 60-MAR Fed. Probation 60, at *62 (March 1996).[7]

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[7] In 1990, the federal courts and the U.S. Health Service's Division of Federal Occupational Health entered into an interagency agreement providing EAP services nationwide to court managers and employees, as well as their family members. Hardaway, supra, at *60.

That is not to say that the bulk of employees benefiting from EAPs are mentally impaired, much less that they are actually "disabled" or "regarded as" disabled within the meaning of the ADA. EAPs provide counseling "on everything from alcohol and drug abuse to financial, legal and marital problems." *To The Couch; Employee Assistance Programs*, The Economist, July 23, 1994, at 65.[8]

It is the threat of workplace violence, however, which has led many employers around the country to make EAPs a key component of their management efforts and benefits packages. According to a Northern National Life Insurance Study, more than 2 million workers were physically assaulted in 1993. See Mark J. Maggio, *Keeping the Workplace Safe: A Challenge for Managers*, 60-MAR Fed. Probation 67 (March 1996). The dangers posed by workplace violence are particularly acute at this juncture in our nation's economic history. As a Safety Training Specialist at the Federal Judicial Center explained:

> Perhaps one of the most serious safety issues for

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[8] In 1994, about 26.6 million Americans were covered by full EAP programs, a 50% increase since 1992. Another 76 million Americans have access to less formal counseling, e.g., telephone hot lines. *To The Couch*, supra, at 65. A 1995 survey of 100 large companies found that 88% of companies surveyed offered their employees EAPs. *Work/life: From a Set of Programs to a Stragegic Way of Management*, 22 Employment Relations Today, Sept. 22, 1995, at 67.

managers is coworker violence. The climate in corporate and government agencies today is ambiguous, uncertain, and tense. Downsizing and reinvention of the workplace have created a myriad of new problems for employees and managers. With these new problems have come more pressures - add them to pre-existing pressures and you end up with people pushed to the breaking point. Employees are finding that the normal coping skills they have called upon in the past may no longer work as well as they once did. Moreover, in today's world, it seems that often people do not want to be, or do not believe they should be, accountable for their behavior. An aggravating factor is the steady increase in violent acts in our streets, homes, and schools and our desensitization to these

> incidents. Mixing all of these ingredients together gives you the perfect recipe for explosive life-threatening behavior in the workplace.

Maggio, supra, at *67. "The EAP plays a key role in the prevention of workplace violence and in the development of a practical, comprehensive response to volatile and traumatic incidents." Hardaway et al., supra, at *65. See also *Developing Policies Addressing Workplace Violence*, 22 Employment Relations Today, Sept. 22, 1995, at 25.

Quantifying the benefits of EAPs in terms of lives saved, lives improved, dollars saved or productivity increased is difficult. However, in times of crisis, either personal or national, EAPs are plainly one of the country's most valuable assets. As noted in *The Employee Assistance Program: Help for Court Managers and Employees*, supra, at *65:

> During this reporting period [FY 1995], EAP professional[s] provided counseling, education, and support services to management, employees, and family members in the aftermath of the Oklahoma City bombing. This tragedy made it clear what a critical role the EAP has in any

> disaster response plan. Within 1 hour of the blast on April 19, 1995, EAP counselors were on site and began assessing needs, counseling court employees and family members, and consulting with managers and supervisors. EAP counselors encouraged employees to vent their feelings about the situation and provided them coping strategies for dealing with the trauma. In the following days, 12 EAP counselors were assigned to Oklahoma City. They provided services to the many federal agencies served by DFOH EAP. For the courts, the EAP offered seven group sessions, which 328 employees attended. Ninety-one individuals were counseled separately.

In the aftermath of the Ninth Circuit's decision, the federal government will probably continue referring employees to EAPS. Many private employers will not. A

recent human resources trade publication summarized the Ninth Circuit's opinion as follows:

> Once a company helps an employee with problems, that indicates it perceives the employee as disabled. That perception triggers full ADA protection, whether in the end the worker was technically disabled or not.

What's Working in Human Resources, Aug. 22, 1996.[9]

The clear implication is that an employer should think twice about assisting an employee whom it believes may have problems, lest it find itself facing an ADA claim. The likely consequence of the Ninth Circuit's decision is unmistakable: employers will not attempt to assist employees who have been exhibiting unusual behavior by

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[9] While the decision has not heretofore been cited by other courts, numerous human resources and legal publications have published articles regarding the decision. See, e.g., Susan A. Bocamazo, *Employee Is Asked If He Has "Problems"; Sues Under ADA: Companies Can No Longer Be 'Compassionate,'* Lawyers Weekly, August 12, 1996, at 1, 17; *Regarded As Disabled Claim Upheld,* The Utah Labor Letter, August 1996, at 17; David E. Rovella, *ADA Triggered By Employer Treatment*, The National Law Journal, July 15, 1996; Al Bianchi, *If You Ask Some Questions, You Can Get Unlucky,* Marin-Independent Journal, October 8, 1996.

recommending that they seek EAP or other help. Some such employees will be summarily terminated. Others will be left alone, while problems go unaddressed and pressures mount.

In sum, while the Ninth Circuit's decision is bad law, it is terrible policy. Courts should be encouraging EAPs, particularly in this era of downsizing and economic uncertainty. In Delval v. PPG Industries, Inc., 590 N.E.2d 1078 (Ind. App. 1992), the plaintiff alleged that his former employer had defamed him by telling an EAP social worker he had expressed suicidal and homicidal thoughts. In affirming summary judgment for the employer, the court stated:

> The effectiveness of employee assistance programs would be severely diminished if a supervisor's referral of an employee to the company's EAP could be considered an intercorporate publication sufficient to sustain a defamation claim. Such a result would have a chilling effect upon employee referrals to EAP's which we recognize as an important benefit for both employers and employees.

Id. at 1081.

The Ninth Circuit's decision will undoubtedly have some chilling effect upon employee referrals to EAPs. The extent and consequences of that chill remain to be seen. Alternatively, they can be avoided -- by reversing the Ninth Circuit's decision and protecting EAP services nationwide.

CONCLUSION

Lucky Stores respectfully requests that this Petition be granted so that this Court can resolve the conflict in the circuits and protect employee assistance programs.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RICHARD D. HOLIHAN, *Plaintiff-Appellant,* v. LUCKY STORES, INC., *Defendant-Appellee.*	No. 95-55409 D.C. No. CV-94-03528-ER OPINION

Appeal from the United States District Court
for the Central District of California
Edward Rafeedie, District Judge, Presiding

Argued and Submitted
May 9, 1996—Pasadena, California

Filed June 26, 1996

Before: Floyd R. Gibson,* John T. Noonan, Jr. and
David R. Thompson, Circuit Judges.

Opinion by Judge Thompson

COUNSEL

Karyn H. Bucur, Newport Beach, California for the appellant.

Kenneth D. Sulzer, Seyfarth, Shaw, Fairweather & Geraldson, Los Angeles, California, for the appellee.

OPINION

THOMPSON, Circuit Judge:

Richard D. Holihan appeals the district court's summary judgment in favor of Lucky Stores, Inc. (Lucky), in Holihan's action for employment discrimination in violation of the Americans With Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.* The district court held that Lucky was entitled to summary judgment because Holihan was not disabled within the meaning of the ADA.

We have jurisdiction pursuant to 28 U.S.C. § 1291, and we reverse. We hold that there is a genuine issue of material fact as to whether Holihan had a disability within the meaning of section 12102(2)(C) of the ADA, which defines "disability" to include "being regarded as having" a substantially limiting impairment.

I

Holihan began working for Lucky's chain of supermarkets in 1966 and became a store manager in 1976. Between 1976 and 1992, he managed eight different stores without any significant problems. Indeed, Holihan was very successful at Lucky, even being named the company's all-time profit producer. Between April and July 1992, however, he was the subject of numerous employee complaints. Among other things, these complaints charged him with hostility and abusiveness, including manhandling, berating and threatening employees.

As a result of these complaints, Lucky District Manager Mark Church and Grocery Supervisor Gary Donne held a meeting with Holihan on July 30, 1992. Church asked Holihan to explain the rash of incidents and inquired if there were any "problems" he was having that Lucky could help him with. Holihan denied the complaints against him and denied

having any problems. Church and Donne decided to transfer Holihan to another store with no history of personnel problems.

Over the next three months, Church received 51 separate complaints from 13 different employees about Holihan's abusive behavior at the new, previously complaint-free, store. These complaints alleged that Holihan, among other things, threw food off of shelves and ordered employees to clean it up, repeatedly threatened to fire the entire staff for no valid reason, and violated money handling and other office procedures.

On October 22, 1992, Church and Lucky South Division Operations Vice President Jim Horsley met with Holihan to discuss these allegations. Holihan denied some and claimed the others were exaggerated. At the conclusion of the meeting, Church offered Holihan a choice of either suspension pending Lucky's investigation into the allegations, or a standard leave of absence if Holihan contacted Lucky's Employee Assistance Program (EAP) for counseling.[1]

On October 26, 1992, Holihan contacted the EAP and began a medical leave of absence. The EAP referred Holihan to Dr. Jonathan Strickler, a psychologist, who diagnosed Holihan as "experiencing stress related problems precipitated by work" and recommended he not return to Lucky until February 1, 1993. This diagnosis was forwarded to Lucky.

In January 1993, Lucky's insurance carrier sent Holihan to Dr. Robert McDaniel in connection with a worker's compensation claim filed by Holihan. McDaniel diagnosed Holihan as suffering from "Organic Mental Syndrome, Not Otherwise Specified." According to this diagnosis, Holihan was experi-

[1]Lucky maintained a liberal leave policy for nonunion employees, such as store managers. Lucky's policy allowed these employees to take up to six months continuous leave for any reason.

encing a "dementing" illness which rendered him "partially psychiatrically disabled from his job." This diagnosis was sent to Lucky's insurance carrier, but not to Lucky.

Holihan did not return to work on February 1, 1993. Instead he requested an extension of his leave until March 1993 on the ground that he was still disabled. Lucky granted this request.

In March 1993, Holihan requested another extension of his leave, supporting this request with a "Claimant's Certification" prepared by Dr. Charles Cramer, who treated Holihan in connection with his worker's compensation claim. The certification stated that Holihan was suffering from "depression and anxiety," and recommended against Holihan returning to work before April 30, 1993. Lucky granted the extension.

In March 1993, while still on leave from Lucky, Holihan began pursuing two other business activities. In March and April 1993, he prepared to open a sign-making business, finding suppliers and training himself in sign and banner production. He also obtained a real estate license and began selling real estate, attending sales meetings, holding open houses, and showing homes to potential buyers. Holihan worked up to 80 hours per week pursuing these two business activities.

In April and May 1993, Holihan twice more requested extensions of his leave. Each request was supported by another certification from Dr. Cramer diagnosing Holihan as having anxiety and depression. Lucky granted the first request, but denied the second and fired Holihan. In its termination letter, Lucky explained that Holihan had already exceeded the six months of leave allowed under Lucky's leave policy. If Lucky had granted the final request, Holihan's leave would have exceeded the policy limits by three months.

On September 1, 1993, Holihan reapplied for a job at Lucky. Lucky agreed to rehire him, but only as a clerk

because no store manager positions were open at the time. Lucky told Holihan that he could apply for a store manager position once one became available, but Holihan refused the offer.

On May 27, 1994, Holihan filed a complaint in the district court alleging Lucky discriminated against him on the basis of his disability.[2] The district court granted summary judgment in favor of Lucky, holding that Holihan was not disabled within the meaning of the ADA. The district court concluded that Holihan had failed to come forward with sufficient evidence to raise a genuine issue of material fact as to whether he was actually disabled or whether Lucky regarded him as disabled, within the meaning of the ADA. This appeal followed.

II

We review the district court's grant of summary judgment de novo. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 1261 (1996). Summary judgment is appropriate if, viewing the evidence in the light most favorable to the nonmoving party, there are no genuine issues of material fact in dispute and the district court correctly applied the relevant substantive law. *Id.*

III

[1] Section 12112 of the ADA prohibits employers from discriminating against disabled individuals on the basis of their disabilities. 42 U.S.C. § 12112(a). Section 12102(2)(A)

[2]Holihan also raised several claims arising under California law. The district court chose not to exercise jurisdiction over these state law claims. The parties do not challenge this decision and therefore we do not address it. We note, however, that in view of our reversal of the district court's summary judgment, that court may wish to reconsider its dismissal of Holihan's state law claims.

defines "disability" to include "a physical or mental impairment that substantially limits one or more of the major life activities." Section 12102(2)(C) also defines "disability" to include "being regarded as having such an impairment." 42 U.S.C. § 12102(2).

We first consider the question whether a genuine dispute of material fact exists with regard to whether Holihan was actually disabled within the meaning of the ADA. To determine this, we consider whether Holihan suffered from a "physical or mental impairment" which "substantially limit[ed] one or more of [his] major life activities." 42 U.S.C. § 12102(2).

[2] We assume for the purposes of this appeal that Holihan suffered from a physical or mental impairment covered by the ADA.[3] Even if Holihan had a mental or physical impairment covered by the ADA, however, we conclude that the impairment did not substantially limit any of his major life activities.

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[3]Although Lucky would have us hold that the impairments of which Holihan complained are not recognized mental disorders, we decline to do so. Holihan's stress and depression could be covered by the ADA. An EEOC Technical Assistance Manual on the ADA provides that " 'stress' and 'depression' are conditions that may or may not be considered impairments, depending on whether these conditions result from a documented physiological or mental disorder." EEOC Technical Assistance Manual on the Employment Provisions (Title I) of the Americans With Disabilities Act § 2.1(a)(i), at II-3 (1992).

It is possible that Holihan's stress and depression resulted from "organic mental syndrome," which contrary to Lucky's argument is a recognized mental disorder. The Diagnostic and Statistical Manual of Mental Disorders, a comprehensive classification of mental disorders published by the American Psychiatric Association, includes a sixty-three page section entitled "Organic Mental Syndromes," which discusses dementia, delirium, and other disorders that affect one's personality. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 100-63 (3d ed. rev. 1987) (DSM). It lists "organic mental syndrome, not otherwise specified" as a residual category for organic mental syndromes that do not fit neatly into the standard patterns of dementia and delirium. *Id.* at 100.

Therefore, Holihan was not actually disabled within the meaning of section 12102(2)(A).

[3] Holihan was not substantially limited from the major life activity he alleged, working. *See* 29 C.F.R. § 1630.2(i) (working is a major life activity within the ADA). For an impairment to substantially limit one's ability to work, it must not merely prevent one from working at a particular job; it must prevent one from working at a class of jobs or a broad range of jobs in various classes. 29 C.F.R. § 1630.2(j)(3).

[4] Holihan's impairment was not severe enough to substantially limit his ability to work. During the final months of his leave of absence Holihan worked considerable hours pursuing real estate and sign-making business activities. According to Holihan's testimony, at least two months prior to his termination he began to set up his sign-making business and to work for a real estate company. He admitted he worked up to eighty hours a week pursuing these occupations beginning in March or April 1993.

Holihan does not challenge the assertion that he worked numerous hours pursuing two different occupations while on leave of absence. Nor does he argue that these occupations were of a different class than his store manager job, such that he was limited from the latter but not the former.[4] Rather, he argues that this work constituted "mitigating measures," akin to treatment, that enabled him to overcome his impairment.

Under EEOC regulations, we are not to consider mitigating measures in determining whether an individual is disabled. 29 C.F.R. § 1630.2(h)(App.). However, Holihan provides no evidence to back up his assertion that this outside work was a form of treatment. No doctor recommended Holihan engage

[4]Because Holihan has not raised this argument on appeal, we assume that his job as a store manager was of the same class of work he pursued in his real estate and sign-making endeavors.

in outside work, nor is it apparent that real estate or sign-making work is a form of therapy for Holihan's impairments.

[5] We hold that Holihan failed to come forward with sufficient evidence to raise a genuine issue of material fact on the question of his actual disability. We conclude as a matter of law that he was not actually disabled within the meaning of 42 U.S.C. § 12102(2)(A) because he was not substantially limited from any major life activity.

Even if Holihan were not actually disabled, the ADA prohibits discrimination against individuals "regarded as" disabled. If Lucky regarded Holihan as disabled, Holihan would have a "disability" within the meaning of section 12102(2)(C). We conclude there is a genuine issue of material fact as to this issue.

[6] Lucky called Holihan into two separate meetings to discuss his aberrational behavior. At one of these meetings, Lucky District Manager Church asked Holihan if he was having any "problems;" at the other, Church strongly encouraged Holihan to seek counseling through Lucky's EAP. Lucky also received several doctors' reports diagnosing Holihan with depression, anxiety and stress, including the reports of Drs. Strickler and Cramer.[5] From these facts, a reasonable jury could infer that Lucky regarded Holihan as suffering from a disabling mental condition that substantially limited his ability to work.

On the other hand, the record also contains facts which might lead a trier of fact to conclude that Lucky did not regard Holihan as disabled.

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[5]The record is unclear as to whether Lucky received the diagnosis of Dr. McDaniel, one of the doctors to whom Lucky sent Holihan in connection with the worker's compensation claim.

[7] Our obligation in reviewing a grant of summary judgment is to view the facts in the light most favorable to the nonmoving party. So viewed, the facts here create a genuine issue of material fact as to whether Lucky regarded Holihan as disabled within the meaning of section 12102(2)(C) of the ADA.[6]

REVERSED.

[6]Our holding is limited to one aspect of Holihan's *prima facie* case, whether he had a "disability" within the meaning of 42 U.S.C. § 12102(2). We express no opinion on the other elements of Holihan's ADA claim.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
August 7, 1996
Cathy A. Catterson,
Clerk, U.S. Court of Appeals

RICHARD D. HOLIHAN,
Plaintiff-Appellant,
vs.
LUCKY STORES, INC.,
Defendant-Appellee.

No. 95-55409
D.C. No. CV-94-03528-ER

ORDER

Before: GIBSON, NOONAN and THOMPSON,
Circuit Judges.*

The panel, as constituted above, has unanimously voted to deny the petition for rehearing. Judges Noonan and Thompson voted to reject the suggestion for rehearing en banc.

The suggestion for en banc rehearing has been circulated to the full court, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED.

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* Honorable Floyd R. Gibson, Senior Circuit Judge for the Eighth Circuit, sitting by designation.

94 F.3d 645 (Table)
Unpublished Disposition
(Cite as: 94 F.3d 645, 1996 WL 452858 (6th Cir.(Ohio)))

NOTICE: Sixth Circuit Rule 24(c) states that citation of unpublished dispositions is disfavored except for establishing res judicata, estoppel, or the law of the case and requires service of copies of cited unpublished dispositions of the Sixth Circuit.

(The decision of the Court is referenced in "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter.)

Carol A. SIMPKINS, Plaintiff-Appellant,

v.

SPECIALTY ENVELOPE, INC., Defendant Appellee.

No. 95-3370.
United States Court of Appeals, Sixth Circuit.
Aug. 9, 1996.

On Appeal from the United States District Court for the Southern District of Ohio, No. 93-00617; Sandra S. Beckwith, Judge.

S. D. Ohio

AFFIRMED.

Before: MILBURN and BOGGS, Circuit Judges; and QUIST, District Judge [FN*].

FN* The Honorable Gordon J. Quist, United States District Judge for

the Western District of Michigan, sitting by designation.

PER CURIAM.

**1 Carol A. Simpkins appeals from a grant of summary judgment to her employer, Specialty Envelope, Inc. ("Specialty"), the defendant in this suit based primarily on the Americans with Disabilities Act ("ADA"). We affirm the district court opinion in its entirety.

Simpkins started working for Specialty in August 1992, after Specialty's predecessor, Western Paper Co., was purchased by Specialty out of receivership. She had been employed by Western Paper for 20 years. She started out as a machine operator and in 1988 was promoted to Personnel Director, a position that she held for a time even after Western Paper changed ownership. Simpkins asserts, and Specialty does not contest, that her performance was always rated highly while she worked for Western Paper. The first indication contained in the record that her work performance for Specialty was substandard occurred on the day before her employment with Specialty ended.

Sometime during Simpkins's tenure as Personnel Director, Sam Venanzio became General Manager of Specialty. Venanzio appointed Michelle Hughes, whom he later married, to the position of Director of Administration. After Hughes became Director of Administration, she demoted Simpkins to Order Entry Clerk. Simpkins was given the choice of accepting this demotion or losing her job; she chose the former option. She continued to handle most of her personnel duties, however. At one point, Simpkins went to speak to Venanzio about her demotion and Venanzio assured her that she was a valuable worker whom he would not "even consider" letting go. Simpkins alleges that she feared that she

was being pushed out of the company by Venanzio who wanted to replace her with Hughes. She also claims that Venanzio began to avoid her around the office, having "washed his hands" of her. Hughes told Simpkins that Venanzio did not want to deal with her anymore, and that if Simpkins could not get along with Hughes, she should quit. Eventually, Hughes assumed some of Simpkins's personnel duties.

Simpkins then began handling customer service matters in addition to working on the personnel responsibilities that remained part of her job. During this period, she was working 10-12 hour days. Later, billing was added to her responsibilities. Around this time, two of Simpkins's co-workers were made her supervisors-Teresa Hall and Ginger Lawless. A sister of one of these supervisors was brought into Specialty to take over some of Simpkins's functions. Simpkins claims that Specialty was heaping more work on her and bestowing rewards upon others, in an attempt to force her out of the company.

On Friday, October 9, 1992, Hall and Lawless asked Simpkins to meet with them to discuss various alleged problems with her work performance. Though she had never been admonished in such a fashion before, Simpkins was given a "final" warning by Hall and Lawless. After this meeting, Simpkins returned to her work station, became extremely agitated when a co-worker asked her what was wrong, and ran into the bathroom. While there, Simpkins cried and beat on the walls. She then ran through the sales department, away from her work station, to a park bench outside the building where Specialty Paper was located, stuffing tissues in her mouth to keep from screaming. Later she returned to the plant and attempted to call her husband so that he would come to pick her up and take her home. When

neither Simpkins nor Specialty Production Manager Lou Woerner were able to reach her husband, Simpkins was taken home by Deborah Gladwell, a manager in the shipping department. Gladwell described Simpkins as shaking, hysterical, and repeatedly striking herself with clenched fists.

**2 Woerner gave Simpkins permission to go home. Simpkins had not asked permission to go home from either of her direct supervisors, Hall or Lawless, however, allegedly because of her emotional condition. Simpkins claims that Lawless and Hall were unavailable at the relevant time, a fact supported by Woerner's deposition. A co-worker told Lawless that Simpkins had left work. When Woerner told Venanzio of Simpkins's breakdown and departure from work, Venanzio responded, "OK. "

Larry Simpkins, Carol Simpkins's husband, returned home to find his wife hysterical and hyperventilating, "jamming food in her like there was no more." He immediately called a doctor. The doctor prescribed medicine to Simpkins to calm her down, but this remedy did not have the desired effect. Larry Simpkins then took his wife to a hospital, where another doctor referred her to a psychiatric hospital. Later, Larry Simpkins called his niece, Tracy Farrell, who also worked at Specialty, and asked her to bring to his home his wife's book, sweater, and coffee cup, which his wife had left at work. At the end of Friday, October 9, 1992, Venanzio sent a memorandum to Hughes stating that Carol Simpkins's departure without notification to her direct supervisors constituted her resignation.

On the following Monday, October 12, 1992, at a time Specialty claims was later in the morning than Carol Simpkins was scheduled to begin work, Larry Simpkins called Specialty and informed Venanzio that his wife had

been hospitalized and would not be able to work for several days. Before receiving Larry Simpkins's call, however, Specialty had determined that Carol Simpkins had resigned because she left the building without the permission of her immediate supervisors. Larry Simpkins insisted to Venanzio that his wife had not quit and that she planned to return once she was out of the hospital. Venanzio told Larry Simpkins this would not be possible, as Carol Simpkins was no longer an employee of Specialty. Venanzio then circulated a second memorandum detailing his conversation with Larry Simpkins. In this memorandum, Venanzio again noted that it was a violation of company policy for Simpkins to have left the workplace without the permission of her direct supervisor. There is undisputed evidence in the record that Specialty had terminated three other workers for this same infraction of the company's rules. After circulating the memorandum, Venanzio moved quickly to cancel Simpkins's health insurance.

Two days later, on October 14, 1992, Simpkins was released from the hospital. She began looking for another job on October 23, 1992. Simpkins said she felt like she was ready to work at that time. Simpkins claims that she has continued psychiatric treatment when she could afford it and that she takes Prozac daily to control her depression. Neither Simpkins nor anyone else on her behalf requested that Specialty reinstate her to her former position. She never told anyone at Specialty that she was suffering from a disability or that a doctor had diagnosed her as having had a major depressive episode.

**3 After she was terminated, Simpkins remained unemployed for about one year. She then worked part-time at a bakery for several months before finding full-time employment, including fringe benefits, at the Biggs

Grocery Store for $3.70 per hour less than she was earning at Specialty. Simpkins never missed any work at the bakery or Biggs Grocery due to depression.

Dr. James Mulderig diagnosed Simpkins as having had a major depressive episode leading up to and including the October 9 incident. He opined that she was not aware of her depression and so could not have told Specialty about it, or asked for any accommodation. Simpkins claims that Lawless's deposition supports the conclusion that people at Specialty were aware that she was "not herself" before the incident. However, Lawless's deposition does not support this assertion. In fact, Simpkins admitted that she had never told anyone at Specialty anything that would lead them to believe that she was unable to perform her normal daily function because of some mental problem or disability that she had. Moreover, Simpkins responded in the negative to the following question when she was deposed: "Do you have any reason to think that other people at work, before October 9, knew that you were suffering from a condition that made you unable to perform your normal work functions?"

On September 2, 1993, Simpkins filed a complaint alleging that she had been discriminated against under the ADA and the Ohio Civil Rights Act. Additionally, her complaint asserted various other theories to support a recovery under Ohio law, including a defamation claim related to the circulation of Venanzio's memorandum about the circumstances of her termination, a breach of contract and/or promissory estoppel claim, and a claim for intentional infliction of emotion distress. Specialty filed a motion for summary judgment on May 10, 1994, which the district court granted on February 17. 1995.

II

We review grants of summary judgment de novo. Baggs v. Eagle-Picher Indus., Inc., 957 F.2d 268, 271 (6th Cir.), cert. denied, 113 S.Ct. 466 (1992). We must affirm only if we determine that the pleadings, affidavits, and other submissions show "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). When evaluating an appeal of this nature, we view the evidence in the light most favorable to the nonmoving party. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

One of the major problems with the district court's opinion in this case is that it did not make explicit the basis of its jurisdiction over Simpkins's state law claims. Simpkins's complaint does not allege diversity jurisdiction and in fact asserts the existence of "pendent jurisdiction," now known as supplemental jurisdiction. 28 U.S.C. § 1367(a). Therefore, we assume that only supplemental jurisdiction exists in this case. Given that the district court granted summary judgment to Specialty with respect to Simpkins's only federal law claim, it should have gone on to consider whether it was appropriate to dismiss her pendent state law claims without prejudice. "It is generally recognized that where, as in this case, federal issues are dismissed before trial, district courts should decline to exercise jurisdiction over state law claims." Gaff v. FDIC, 814 F.2d 311, 319 (6th Cir.1987) (citing United Mine Workers v. Gibbs, 383 U.S. 715 (1966)).

**4 Here, we will address Simpkins's pendent state law claims because of the extensive discovery that has taken place. See Taylor v. First of Amer. Bank-Wayne, 973 F.2d

1284, 1288 (6th Cir.1992) (district court properly exercised supplemental jurisdiction when case had been on court's docket for nearly two years and parties had completed discovery, compiling an enormous record). Important to our decision not to remand was the fact that both Simpkins and Specialty urged us to reach the state law issues in this case. We note, however, that we address the merits of Simpkins's state law claims reluctantly. The discretion involved in exercising supplemental jurisdiction has been reposed in the district courts. We will normally review an exercise of supplemental jurisdiction for abuse of that discretion and remand if a district court does not indicate what motivated its decision to exercise supplemental jurisdiction when all federal question claims have been dismissed prior to trial. See Hankins v. The Gap, Inc., 84 F.3d 797, 802 (6th Cir.1996) (abuse of discretion review). District courts should follow the normal procedure of providing reasons for exercising supplemental jurisdiction when choosing to do so contrary to the general rule in favor of dismissing without prejudice pendent state law claims when the basis for federal question jurisdiction is eliminated before trial.

A. ADA & OHIO CIVIL RIGHTS ACT

Simpkins's first state law claim under the Ohio Civil Rights Act, Ohio Rev.Code Ann. ch. 4112 (Baldwin 1995), is essentially similar to her claim under the ADA, and the results of our analysis would not be altered in the Ohio state law context.

In granting summary judgment to Specialty on Simpkins's ADA claim, the district court relied on Equal Employment Opportunity Commission ("EEOC") regulations inapplicable to this case. See, e.g., Mem.Op. at 9 (citing to 29 C.F.R. Pt. 1613). Part 1613 of the

regulations issued by the EEOC governs only federal workers. See 29 C.F.R. § 1613.201(b) (July 1, 1995) (now rescinded). We may, however, affirm the district court's decision on any ground, not merely those it relied upon. Russ' Kwik Car Wash, Inc. v. Marathon Petroleum, 772 F.2d 214, 216 (6th Cir.1985) (per curiam).

In order to maintain a claim under the ADA, Simpkins must establish that she is disabled. The ADA defines the term "disability" as a "[1] physical or mental impairment that substantially limits one or more of the major life activities of [an] individual[,] [2] a record of such impairment[,] or [3] being regarded as having such an impairment." 42 U.S.C. § 12102(2)(A)-(C); Ohio Rev.Code Ann. § 4112.01(a)(13) (providing definition of "handicap" very similar to ADA definition of "disability"). Regulations under the ADA define "a physical or mental impairment" as including "any mental or psychological disorder." 29 C.F.R. § 1630.2(h). A "major life activity" includes working. 20 C.F.R. § 1630.2(i).

**5 Simpkins's claim is barred under any of the three definitions of disability, however, because an employer who discharges an employee without knowledge of the employee's disability is not liable under the ADA. An employer must discriminate against an employee "because of" that employee's disability in order to violate the ADA. 42 U.S.C. § 12112(a). (See Ohio Rev.Code Ann. § 4112.02(a) (Baldwin 1995) (also using "because of" language); Lillback v. Metropolitan Life Ins. Co., 640 N.E.2d 250, 258-59 (Ohio Ct.App.1994) (plaintiff was suffering from a handicap but could not recover, as he was not discharged "because of" that handicap).) Cf. John Flynn, Note, Mixed-Motive Causation under the ADA: Linked Statutes, Fuzzy Thinking, and Clear Statements, 83

Geo.L.J. 2009, 2051 (1995) (the text and legislative history of the ADA is best read to require "but-for" causation, not mixed-motive causation). [FN1] "Employers are obligated to make reasonable accommodation only to the physical or mental limitations resulting from the disability of a qualified individual with a disability that is known to the employer. Thus, an employer would not be expected to accommodate disabilities of which it is unaware." 29 C.F.R. Pt. 1630 (App.). See also Hedberg v. Indiana Bell Tel., 47 F.3d 928, 932-34 (7th Cir.1995) ("The ADA does not require clairvoyance.") Cf. Landefeld v. Marion Gen. Hosp., Inc., 994 F.2d 1178, 1181 (6th Cir.1993) (Rehabilitation Act of 1973 ("Rehabilitation Act") plaintiff must establish discrimination "solely on the basis of" handicap--no liability where employer had no knowledge of a mental disability); Hamm v. Runyon, 51 F.3d 721, 725 (7th Cir.1995) (ADA borrows heavily from Rehabilitation Act and therefore it can be used as an interpretive guide to questions arising under the ADA)

FN1. The Sixth Circuit has not yet addressed the question of whether the ADA requires "but-for" causation, or permits mixed-motive analysis. In Maddox v. University of Tenn., 62 F.3d 843, 846-48 (6th Cir.1995), the court suggested that the standard of causation under the ADA is identical to the "but-for" causation standard clearly required by similar language in the Rehabilitation Act.

It is undisputed that Simpkins never requested any accommodation and never specifically told Specialty that she was disabled. She even admitted that she had no reason to think that anyone at Specialty knew that she was disabled. Of course, Dr. Mulderig indicates that Simpkins did not know she was suffering from a mental disability until after the October 9 incident occurred. But the time for the Simpkinses to have informed Specialty of Carol Simpkins's disability was as soon as practicable after the

onset of that disability. Neither Carol nor Larry Simpkins did so. We reject Simpkins's argument that her husband's phone call to Venanzio constituted a constructive request for an accommodation. It may have been a request for an "accommodation" of what the record shows Specialty could have had assumed was a temporary illness, but the phone call was not a request for an "accommodation" of a "disability" protected under the ADA. Larry Simpkins simply did not tell Specialty that his wife had a "major depressive episode" and request that this disability be accommodated. Specialty had no knowledge that Simpkins was disabled within the meaning of the ADA, and therefore it was under no duty to construe a request for an exception from company policy as a request for the accommodation of a disability. Therefore, Simpkins's claim under any of the three ADA categories of disability must fail.

**6 The district court's grant of summary judgment to Specialty in relation to the ADA issue also must be upheld because Simpkins's claims that she falls into the first category of disability under the ADA--having a "substantial [ ] limit[ation on] one or more of [her] major life activities"--are weak. Her disability was only a temporary, non-chronic impairment. These kinds of impairments are not sufficient to trigger category one disability under the ADA. See 29 C.F.R. § 1630.2(j)(2)(ii) (courts may consider the duration or expected duration of the impairment under the ADA in deciding whether a claimant is "substantially limit[ed]" in performing "major life activities"); Margeson v. Springfield Terminal Ry., No. CIV.A. 91-11475-Z, 1993 WL 343676, at *5 (D.Mass. Aug. 24, 1993) (plaintiff under Rehabilitation Act with stress-related panic disorder who needed to make visits to the emergency room, to doctors, to participate in stress management therapy, to cancel a family vacation, and occasionally be absent from work had no

substantial limitation on his ability to work).

Simpkins's claim for category one disability also fails because she indicated that she was able to return to work one week after the October 9 incident and has not missed a single day of work due to her alleged disability at the bakery or at the Biggs Grocery. Simpkins attempts to respond to this argument by pointing to an Appendix issued by the EEOC to aid in the interpretation of the ADA. Simpkins claims that the Appendix establishes that her disability should be judged without considering the effects of the medicine she takes to control her depression. See 29 C.F.R.App. Pt. 1630. When discussing 29 C.F.R. § 1630.2(h), this Appendix notes: "The existence of an impairment is to be determined without regard to mitigating measures such as medicines, or assistance or prosthetic devices." 29 C.F.R.App. Pt. 1630. (The ADA seems to differ in this respect from the Rehabilitation Act and therefore Specialty's citation to Mackie v. Runyon, 804 F.Supp. 1508, 1510 (M.D.Fla.1992) (bi-polar disorder stabilized by medicine and therefore not a "handicap"), is inapposite.) However, merely because an individual is taking some medicine does not prove that the individual has a "disability" for purposes of the ADA. Roth v. Lutheran Gen. Hosp., 57 F.3d 1446, 1454 (7th Cir.1995). This interpretive guidance provided by the EEOC in its Appendix does not help Simpkins here because she has not produced any evidence regarding her ability to work or perform any major life activities without the use of Prozac. Simpkins must do more than show that there is some "metaphysical doubt as to the material facts." She must come forward with "specific facts showing that there is a genuine issue for trial." Matsushita, 475 U.S. at 586-87. In Castorena v. Runyon, 65 Fair Empl.Prac.Cas. (BNA) 74, 1994 WL 146343 (D.Kan. April 4, 1994), a district court

granted summary judgment against an ADA plaintiff who had alleged that the only effect that she experienced when she stopped taking her medicine was that she became "a little fuzzy around the edges." Simpkins has not alleged any effects that she would experience if she stopped taking Prozac. As a result, she has not met her burden under Fed.R.Civ.P. 56 to avoid summary judgment in this case.

**7 Simpkins argues that she has relatively strong evidence showing that Specialty's explanation for terminating her--that she left work without notifying her immediate supervisors--is pretextual. Assuming this to be true, which it is not, the evidence that Simpkins has presented of pretext is not evidence of a pretext for discrimination against her on the basis of the disability she alleges. The record conveys a strong sense that Simpkins was treated unfairly by Specialty and that she may indeed have been driven out of the company merely because of personal friction with Venanzio's wife, Hughes. However, there is no evidence in this case that Specialty concocted its explanation for terminating Simpkins because it knew that Simpkins was suffering from a major depressive episode, the most important reason for upholding the district court's grant of summary judgment in this case.

B. DEFAMATION UNDER OHIO LAW

Simpkins points to the following separate communications that she alleges were defamatory, which provide in relevant part:

OCTOBER 9 MEMORANDUM

[Carol] left the company premises without notification to or compliance with supervision [sic]. This act is considered her resignation. Due to her departure and the nature of her work

ethics, she is not to be reviewed for future employment. OCTOBER 12 MEMORANDUM

[Venanzio] informed Mr. Simpkins that because of her departure on Friday, October 9, 1992, without any prior notification to management ... her action was considered a resignation.

Statements alleged to be defamatory, yet made in good faith between an employer and an employee, or between two employees concerning a third employee, are protected by a qualified privilege that a plaintiff can only overcome by producing proof of actual malice. Evely v. Carlon Co., Div. of Indian Head, Inc., 447 N.E.2d 1290, 1292 (Ohio) (per curiam); Hanly v. Riverside Methodist Hosps., 603 N.E.2d 1126, 1131 (Ohio Ct.App.l991). Simpkins does not argue that the scope of distribution for these memoranda vitiates the qualified privilege. For instance, Simpkins does not contend that the allegedly defamatory memoranda were made to nonemployees, or to employees who had no legitimate reason to learn of Simpkins's dismissal. Rather, Simpkins argues that the memoranda were known to be false and were made with actual malice.

Simpkins cannot demonstrate the falsity of the memoranda. While it may have been false for Venanzio to have written in the October 12 memorandum that Simpkins had walked off the job for failing to notify anyone, because Simpkins had notified Woerner, Venanzio specifically noted in the October 9 memorandum that Simpkins had not notified her own supervisors. In the October 12 memorandum, he used the more general term "management," but especially since this second memorandum followed on the heels of the first, it would be hyper-technical for us to conclude that because Woerner

was a manager, the second memorandum was untrue. In context, the only conclusion that can be reached is that Venanzio was using the term "management" to refer to himself. Thus, Specialty can successfully assert the qualified privilege and is entitled to summary judgment on Simpkins's defamation claim. Simpkins has introduced no evidence to support her claim that the statements quoted above were made with actual malice, which requires a demonstration that Specialty knew the statements were false when they were made. Hanly, 603 N.E.2d at 1131.

C. BREACH OF CONTRACT/PROMISSORY ESTOPPEL UNDER OHIO LAW

**8 Simpkins argues that Specialty had a policy not to discipline or dismiss employees except with good cause. Joining this with a contention that Specialty did not have good cause to dismiss her, she claims that she is entitled to relief either on a breach of contract or promissory estoppel theory. She relies on Mers v. Dispatch Printing, 483 N.E.2d 150, 152-54 (Ohio 1985), for the proposition that a mere "company policy" can constitute evidence of an employment contract and therefore defeat the presumption that an employee is only an at-will employee. It is undisputed, however, that Specialty has a policy of terminating workers who walk off the job or are absent without informing their direct supervisors. It is also undisputed that when Simpkins left on October 9, she did not tell her immediate supervisors, Hall or Lawless, or request their permission to leave. Furthermore, it is undisputed that other employees had been terminated for similar infractions of the company's policy. Therefore, even if a contract was created by the employment manual here and by company policy, there was no violation of that policy in this case and so there can be no action under Ohio

law for either an implied breach of contract or promissory estoppel.

Simpkins's claim also fails under Ohio cases like Walden v. General Mills Restaurant Group, Inc., 508 N.E.2d 168, 171 (Ohio 1986) (employee could be terminated for refusing to take a polygraph test because the administration of such a test protected the interests of the employer). Specialty's policy of requiring employees to inform direct supervisors before leaving the workplace similarly promotes its interests. Employers are obviously entitled to establish anti-absenteeism policies. And it is not irrational for such a policy to require that an employee inform a direct supervisor before leaving or missing work, because a direct supervisor is more likely than a manager further up the company's hierarchy to know what impact such an absence will have on the company's productivity, and is also more likely to need the absence information.

D. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS UNDER OHIO LAW

It is very difficult to show that one has been subjected to the tort of the intentional infliction of emotional distress. Liability for this tort attaches only to those "who by extreme and outrageous conduct intentionally or recklessly cause[ ] serious emotional distress to another...." Russ v. TRW, Inc., 570 N.E.2d 1076, 1082 (Ohio 1991) (quoting Yeagher v. Local Union 20, 453 N.E.2d 666 (1983) (syllabus)). A reasonable fact-finder might conclude that Simpkins was treated unfairly in this case by her employer of over 23 years. However, the conduct here, even taking Simpkins's theory of the case that Venanzio and Hughes forced her out of the company because of a personality conflict, was not so outrageous as to shock the conscience

and cross the threshold required to show an intentional infliction of emotional distress. See, e.g., Hanly, 603 N.E.2d at 1132 (discharging a worker accused of sexual harassment did not constitute an intentional infliction of emotional distress, because this was a reasonable company policy); Mullholand v. Harris Corp., 72 F.3d 130, 1995 WL 730466 at **7 n. 1 (6th Cir.1995) (unpublished per curiam) (discussing Ohio's tort of intentional infliction of emotional distress based on the Restatement (Second) of Torts § 46) (citing Pratt v. Brown Machine, 855 F.2d 1225, 1238-42 (6th Cir.1988) (where facts were egregious enough to establish tort occurred)). Here, the employer had a reasonable company policy prohibiting an act that Simpkins engaged in--it is simply not unconscionable to enforce such a policy, even where one suspects that there was more than a desire to enforce the policy motivating the employer in taking the actions it did. Simpkins cites Pater v. Health Care & Retirement Corp., 808 F.Supp. 573 579 (S.D.Ohio 1992) (declining to dismiss intentional infliction of emotional distress claim), but either ignores, or fails to realize, that Pater was a case dismissed at the Fed.R.Civ.P. 12(b)(6) stage. Obviously, the standard for dismissal is stricter at that stage of procedural review.

III

**9 The district court's grant of summary judgment to Specialty is AFFIRMED.

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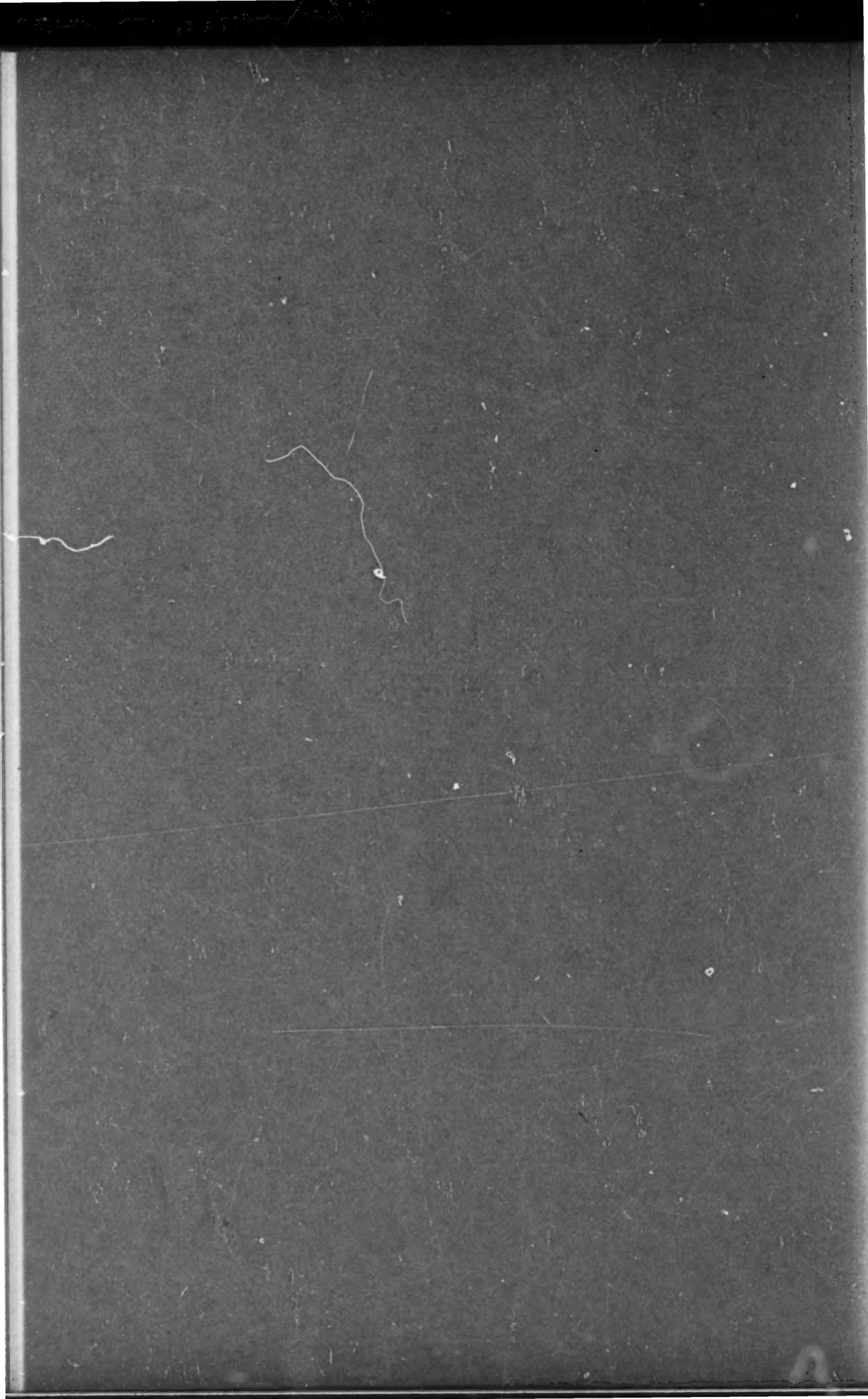

D1

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FILED
March 13, 1996
Clerk, U.S. District Court
Central District of California
By Deputy

RICHARD HOLIHAN,
Plaintiff,
v.
LUCKY STORES, INC.,
Defendant.

CV 94-3528 ER (CTx)

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S FEDERAL CAUSE OF ACTION, AND DISMISSING PLAINTIFF'S REMAINING CAUSES OF ACTION

The Defendant's motion came before the Honorable Edward Rafeedie on March 13, 1995.

The Court, having read and considered the motion, argument of counsel and all other matters presented to the Court, HEREBY ORDERS, for the reasons stated in open court, as follows:

The Defendant's motion for summary judgment on Plaintiff's Federal cause of action for violation of 42 U.S.C. § 12117, the Americans with Disabilities Act, is

granted. Plaintiff's remaining causes of action are dismissed without prejudice in order that they may be filed in state court

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk of the Court shall serve, by United States mail, copies of this Order on counsel for the parties in this matter.

Dated: March 13, 1995

/s/ EDWARD RAFEEDIE
EDWARD RAFEEDIE
United States District Judge

MOTION FILED
DEC - 5 1996

(2)

No. 96-723

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

LUCKY STORES, INC.,
Petitioner,
v.
RICHARD D. HOLIHAN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

24 pp

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---

MOTION OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL FOR LEAVE TO SUBMIT A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 37 of the Rules of this Court, the Equal Employment Advisory Council (EEAC) respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of Lucky Stores, Inc., Petitioner, whose written consent has been provided to the Clerk of the Court.

Counsel for Respondent, Charles Don Crawford, after being asked, has not consented. Because all parties have not consented, a motion to file this brief is required.

In support of this motion, EEAC, by the following, shows that its brief brings relevant matters to the attention of this Court that have not been presented by the parties.

1. EEAC is a voluntary association of employers organized to promote sound approaches to the elimination of employment discrimination. Its membership includes nearly 300 major U.S. corporations, as well as several associations which themselves have hundreds of corporate members. EEAC has a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

2. All of EEAC's members and the constituents of its association members, are employers subject to the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* (ADA), and other equal employment statutes and regulations. In addition, many are federal contractors subject to § 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793.

3. As employers, and as potential respondents to disability discrimination charges, EEAC's members are concerned about the scope of the definition of "disability," which establishes the parameters of the protected class under the ADA.

4. The issues presented in the petition are also extremely important to EEAC's members because most offer Employee Assistance Programs (EAPs). If the Ninth Circuit's decision stands, member companies will be forced to assess the extent to which, and manner in which, they will be able to continue offering EAPs and related programs.

5. Because of its interest in the application of the nation's civil rights laws, EEAC has, since its founding in

1976, filed briefs as *amicus curiae* in cases before the United States Supreme Court, the United States Circuit Courts of Appeals and various state supreme courts. As part of this *amicus* activity, EEAC has participated in several cases involving the proper interpretation of the Americans with Disabilities Act,[1] as well as numerous cases in this and other courts involving the proper interpretation of the Rehabilitation Act of 1973, the predecessor to the ADA, and similar laws and regulations.[2] EEAC also filed extensive comments in response to the Equal Employment Opportunity Commission's Notice of Proposed Rulemaking on its substantive regulations implementing the employment provisions of the ADA. 56 Fed. Reg. 8578 (1991) (final regulations codified at 29 C.F.R. § 1630). In addition, EEAC has briefed a number of other employment issues in this Court.[3]

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[1] *E.g., EEOC v. AIC Sec. Investigations,* 55 F.3d 1276 (7th Cir. 1995) (individual liability); *Hedberg v. Indiana Bell Tel. Co.,* 47 F.3d 928 (7th Cir. 1995) (ADA not violated where employer was unaware of disability at time of adverse decision); *Carrozza v. Howard County,* 45 F.3d 425 (4th Cir. 1995) (elimination of essential function not a reasonable accommodation); *McKay v. Toyota,* No. 95-5617 (6th Cir. 1995) (decision pending) (EEOC's interpretation of major life activity of "working" under the ADA).

[2] *E.g., School Bd. of Nassau County v. Arline,* 480 U.S. 273 (1987); *Sharpe v. American Tel. & Tel. Co.,* 66 F.3d 1045 (9th Cir. 1995) (scope of reasonable accommodation obligation); *Pandazides v. Virginia Bd. of Educ.,* 13 F.3d 823 (4th Cir. 1994) (scope of accommodation obligation regarding licensing or certification examination); *Buckingham v. United States,* 998 F.2d 735 (9th Cir. 1993) (extent of reasonable accommodation obligation); *Walders v. Garrett,* 956 F.2d 1163 (4th Cir. 1992) (attendance as essential job function); *Russell v. Frank,* 971 F.2d 744 (1st Cir. 1992) (*per curiam*) (termination for falsification of medical questionnaire).

[3] *E.g., O'Connor v. Consolidated Coin Caterers Corp.,* —— U.S. ——, 116 S. Ct. 1307 (1996); *Harris v. Forklift Sys.,* 510 U.S. 17 (1993); *Hazen Paper Co. v. Biggins,* 507 U.S. 604 (1993); and *International Bhd. of Teamsters v. United States,* 431 U.S. 324 (1977).

6. Thus, EEAC has an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case. Indeed, because of its significant experience in these matters, EEAC is uniquely situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties to the case.

7. This brief is timely as it is being filed within the time allowed in Supreme Court Rule 37.2 for filing a brief in support of the petition for writ of certiorari.

WHEREFORE, for the reasons stated, the Equal Employment Advisory Council respectfully requests that the Court grant it leave to file a brief as *amicus curiae* in this case in support of Petitioners.

Respectfully submitted,

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council (EEAC) respectfully submits this brief *amicus curiae*, contingent on the granting of the accompanying motion for leave. The brief supports the petition for writ of certiorari.

INTEREST OF THE *AMICUS CURIAE*

The interest of the *amicus curiae* is set forth fully in the preceding motion.

STATEMENT OF THE CASE

Respondent Richard D. Holihan began working for Petitioner Lucky Stores, Inc. (Lucky) in 1966. (Pet. App. at A2.) He became store manager in 1976, and until the spring of 1992, managed eight different stores without any

significant problems. (*Id.*) Between April and July of 1992, however, Lucky received numerous employee complaints charging Holihan with hostile and abusive behavior, including manhandling, berating, and threatening employees. (*Id.*)

As a consequence of the complaints, on July 30, 1992, Lucky District Manager Mark Church and Grocery Supervisor Gary Doone met with Holihan. Seeking an explanation for the recent incidents, Church asked Holihan if he was having any "problems" with which Lucky could help him. Holihan denied that the alleged incidents had occurred as charged and denied having any problems. Church and Doone decided to move Holihan to another store, where there had been no previous personnel problems. (*Id.* at A2-A3.)

Complaints regarding Holihan, however, persisted. In the next three month period, thirteen employees filed 51 complaints with Lucky regarding Holihan's abusive behavior. Among other things, the complaints charged that Holihan threw food off the store shelves and ordered employees to clean it up, repeatedly threatened, without justification, to terminate the entire staff, and violated money handling and other office procedures. (*Id.* at A-3.)

In response to these new complaints, Church and Lucky South Division Operations Vice President Jim Horsley met with Holihan on October 22, 1992. After reviewing the allegations in the complaints, which Holihan claimed were untrue or exaggerated, Church offered Holihan a choice. Either Holihan would take a standard leave of absence [1] and contact the company's Employee Assistance Program (EAP) for counseling, or he would be suspended, pending Lucky's investigation into the complaints. Holihan chose to take the leave and contact the EAP. (*Id.*)

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[1] Lucky maintained a leave policy permitting store managers, among others, six months continuous leave for any reason.

Holihan contacted the EAP on October 26, 1992 and began a medical leave of absence. (*Id.*) Through a referral from the EAP, Holihan was examined and diagnosed by a psychologist, who concluded Holihan was "experiencing stress related problems precipitated by work." (*Id.*) This diagnosis was sent to Lucky, along with a recommendation that Holihan remain off work until February 1, 1993. (*Id.*)

Subsequently, in relation to a workers' compensation claim he filed, Holihan was seen by another doctor, who diagnosed him as suffering from "Organic Mental Syndrome, Not Otherwise Specified," a condition rendering him "partially psychiatrically disabled from his job." This diagnosis was not sent to Lucky, although it was sent to Lucky's insurance carrier. (*Id.* at A3-A4.)

Holihan did not return to work on February 1, 1993, but requested an extension of his leave until March of 1993, contending that he remained disabled. (*Id.* at A-4.) Lucky granted his request. Lucky also granted Holihan's subsequent request to extend his leave through April 30, 1993, which was supported by a doctor's statement that Holihan was suffering from "depression and anxiety." Holihan obtained yet another extension of leave in April of 1993. (*Id.*)

Meanwhile, during the months of March and April, Holihan began working up to 80 hours a week on two new businesses. He sought suppliers and trained himself in sign and banner production in order to open a sign-making business, and he obtained a real estate license and began selling homes. (*Id.*)

When Holihan requested additional time off in May of 1993, Lucky denied his request and terminated his employment. Lucky explained to Holihan that he already had exceeded the limit for leave and that the additional time he sought would have extended his leave three months beyond the amount permitted under company policy. (*Id.*)

Holihan reapplied for a position with Lucky on September 1, 1993. Having no store manager positions available, Lucky offered to hire Holihan as a clerk and invited him to apply for the next available store manager position. Holihan declined the offer. (*Id.*)

Holihan then sued Lucky in federal district court, alleging disability discrimination. (*Id.* at A5.) The District Court granted summary judgment in favor of Lucky, holding that Holihan had failed to come forward with sufficient evidence to show that he was disabled within the meaning of the ADA or regarded as such by Lucky. (*Id.*) The Ninth Circuit affirmed in part and reversed in part, agreeing that Holihan had failed to produce sufficient evidence to show that he was actually disabled, but concluding that Holihan had come forward with enough evidence to raise an issue of material fact on the question of whether Lucky regarded him as disabled. (*Id.* at A8-A9.)

The Ninth Circuit subsequently denied Lucky's Petition for Rehearing and Suggestion for Rehearing En Banc. (Pet. App. at B1.) Lucky then filed the instant petition for a writ of certiorari.

SUMMARY OF REASONS FOR GRANTING THE WRIT

This case raises the question of what essential elements an employee must show in order to demonstrate that an employer regarded the employee as disabled under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*, or the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.* In denying Lucky Stores, Inc.'s (Lucky's) motion for summary judgment, the Ninth Circuit misinterpreted or misapplied the ADA's standards for establishing such a claim, contrary to this Court's ruling in *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987).

As reflected in the *Arline* decision, as well as the ADA's legislative history and the United States Equal Employ-

ment Opportunity Commission's (EEOC's) implementing regulations and interpretive guidance, in order to demonstrate that an employer has regarded an employee as disabled, the employee must produce evidence establishing a causal link between the employer's perception of the employee as disabled and the action taken by the employer of which the employee complains. Where no such link exists, the employee has not been regarded as disabled within the meaning of the ADA.

Accordingly, it is essential for an employee claiming ADA coverage on the basis that he or she was regarded as disabled, to offer evidence that the employer acted *on the basis of* a perceived disability. In the case at bar, the Ninth Circuit failed to require this necessary showing. Accordingly, its denial of summary judgment is inappropriate and at odds with *Arline*.

Also in conflict with *Arline* and with the intent of the ADA is the Ninth Circuit's conclusion that an employer's inquiry as to whether an employee, about whom 51 conduct-related complaints had been filed in three months, was having "problems"; its referral of that employee to the company's EAP; and its receipt of doctors' diagnoses that the employee was suffering from stress, depression, and anxiety, sufficed to show that the employer regarded the employee as disabled. The ADA's provision extending coverage to employees regarded as disabled was aimed at eliminating the effects of ignorance and fear about disability, not punishing employers for trying to respond in an enlightened, sensitive, and neutral manner to an employee's conduct problems.

Finally, the Ninth Circuit's ruling will have the perverse and harmful effect of discouraging employers from trying to assist employees exhibiting signs of distress through referral to EAPs or by other means. Such a result would be detrimental not only to employees, who may lose jobs or their best opportunities to obtain help for a whole

spectrum of problems, but also to employers, who may have to let these once valued employees go or continue to suffer the effects relating to employees' unaddressed personal problems.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S RULING CONFLICTS WITH THIS COURT'S DECISION IN *SCHOOL BD. OF NASSAU COUNTY v. ARLINE*, BECAUSE IT FAILS TO REQUIRE A CAUSAL CONNECTION BETWEEN THE ALLEGED PERCEPTION OF IMPAIRMENT AND AN ADVERSE EMPLOYMENT ACTION

The Ninth Circuit's denial of summary judgment to Lucky in this case is based upon a misapplication or misinterpretation of the Americans with Disabilities Act's (ADA's), 42 U.S.C. § 12101 *et seq.*, provision prohibiting discrimination against individuals regarded as disabled and is contrary to this Court's ruling in *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987).

In order to survive summary judgment, a party bearing the burden of proof at trial must put forth evidence establishing the essential elements of the party's case. *Celotex Corp. v. Cartrett*, 477 U.S. 317, 322 (1986). At issue is whether the Ninth Circuit, in reaching the conclusion that Plaintiff offered sufficient evidence to establish that his employer, Lucky Stores, Inc. (Lucky), regarded him as disabled, considered all of the elements necessary to support that claim.

A threshold requirement for coverage under the ADA is that the Plaintiff be an "individual with a disability" as that term is defined in law. Equal Employment Opportunity Comm'n, *EEOC Compliance Manual* 902-1, (1995), *reprinted in, EEOC Compl. Man. (BNA) 902:0001 (1995)*. An individual can establish that he or she is a member of the protected class in any of three ways. The individual can show that he or she: 1) has

a physical or mental impairment that substantially limits one or more of his or her major life activities; 2) has a record of such an impairment; or, 3) is regarded as having such an impairment. 42 U.S.C. § 12102(2).

By definition, an individual who is a member of the ADA's protected class under the third prong of the definition of "disability" does not have a substantially limiting impairment, but is "regarded as" if he did. In discussing the rationale behind this same provision in the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*, upon which the ADA's provision is based, this Court stated in *Arline* that

> [b]y amending the definition of "handicapped individual" to include not only those who are actually physically impaired, but also those who are regarded as impaired and who, *as a result*, are substantially limited in a major life activity, Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.

480 U.S. at 284 (emphasis added). This language reflects the need for a causal connection between the impairment and an adverse employment action.[2]

Congress adopted this interpretation from *Arline* when it passed the ADA. H.R. Rep. No. 101-485, 101st Cong., 2nd Sess., pt. 2, at 53 (1990), *reprinted in*, 1990 U.S.C.C.A.N. 303, 335; H.R. Rep. No. 101-485, 101st Cong., 2nd Sess., pt. 3, at 29-30 (1990), *reprinted in*, 1990 U.S.C.C.A.N. 445, 452-453 (citing *Arline*); S. Rep. No. 101-116, 101st Cong., 1st Sess. 23-24 (1989) (citing *Arline*). This legislative history further elaborates on the types of situations the "regarded as" provision was in-

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[2] The need for a showing that Lucky indeed perceived Holihan as having a substantial limitation, and the applicable standard of proof, are set out fully in the Petition for a Writ of Certiorari and will not be repeated here.

tended to cover. It provides several examples, such as when an employee has a "stigmatic condition," like scarring, or a medical condition that is under control, such as diabetes or epilepsy, or a condition that has been diagnosed but causes no symptoms. In each example, the condition results in the employer's perceiving the individual as disabled and imposing a limitation on that individual's opportunities to work. *Id.* Each includes, as a necessary element, an evaluation of the employer's conduct. For example, the Report of the House Committee on the Judiciary explains: "The perception of the covered entity is a key element of this test. A person who perceives himself to have an impairment, but does not have an impairment, *and is not treated as if he has an impairment,* is not protected under this test." H.R. Rep. No. 101-485, 101st Cong., 2nd Sess., pt. 3, at 30 (1990), *reprinted in,* 1990 U.S.C.C.A.N. 445, 452-453 (*emphasis added*).

The United States Equal Employment Opportunity Commission's (EEOC's) regulations break down the different scenarios under which an individual may be regarded as disabled into three categories. These are: when the individual

> (1) Has a physical or mental impairment that does not substantially limit major life activities *but is treated* by a covered entity as constituting such a limitation;
>
> (2) Has a physical or mental impairment that substantially limits major life activities only *as a result of* the attitudes of others toward such impairment; or
>
> (3) Has none of the impairments defined . . . in this section *but is treated* by a covered entity as having a substantially limiting impairment.

29 C.F.R. § 1630.2(1) (emphasis added). Consistent with *Arline* and the ADA's legislative history, in defining what it means to be regarded as disabled, these regulations focus on the employer's treatment of the employee.

Similarly, the EEOC's ADA Technical Assistance Manual indicates that "[t]his part of the definition protects people who are not substantially limited in a major life activity from disciplinary actions taken *because* they are perceived to have such a limitation." EEOC Technical Assistance Manual § 2.2(c) (emphasis added). Likewise, the EEOC's internal guidance to its own investigators advises that "[t]o determine whether an employer regards an individual as having an impairment that substantially limits major life activities, one must examine the employer's *perception and treatment* of the charging party." Equal Employment Opportunity Comm'n, *EEOC Compliance Manual,* 902-45 (1995), *reprinted in EEOC Compl. Man. (BNA) 902:0045 (1995).*

As these sources reflect, it is the existence of a causal link between the employer's perception of an employee as disabled and its imposition of a limitation on that employee that creates this special category of "disability." For this reason, it is essential that the employer's reasons for acting be examined. Absent evidence that the employer acted on a perception that the individual had an impairment that substantially limited a major life activity, the individual fails to show that he or she was regarded as disabled.

That such a showing is required is confirmed by the House Judiciary Committee Report (which refers to *Arline* for its rationale), where is states in its discussion of "regarded as" disability,

> if a person is disqualified [from employment opportunities] *on the basis of* an actual or perceived physical or mental condition, and the employer can articulate no legitimate job-related reason for the rejection, a perceived concern about employing persons with disabilities could be inferred and the plaintiff would qualify for coverage under the "regarded as" test.

H.R. Rep. No. 101-485, 101st Cong., 2nd Sess., pt. 3, at 30-31 (1990), *reprinted in,* 1990 U.S.C.C.A.N. 445,

452-454 (*emphasis added*). Similarly, the EEOC Compliance Manual explains, "If the employer cannot articulate a non-discriminatory reason for the employment action, an inference that the employer is acting on the basis of 'myth, fear or stereotype' may be drawn." Equal Employment Opportunity Comm'n, *EEOC Compliance Manual* 902-44 (1995), *reprinted in, EEOC Compl. Man. (BNA) 920:0044 (1995).*

Upon examining the evidence in this case, the Ninth Circuit concluded that the Plaintiff had made a sufficient showing to raise an issue of material fact, and thereby avoid summary judgment, on the question of whether the employer regarded him as disabled. The Court failed, however, as dictated by *Celotex,* to require evidence on an essential element of Plaintiff's claim—*i.e.,* evidence tying Lucky's actions to a perception of impairment. Specifically, the Court observed that Lucky's managers met twice with Plaintiff to discuss his abberational behavior; that Lucky's District Manager had, at one of those meetings, inquired of Plaintiff as to whether he was having any "problems"; that Lucky's Managers strongly encouraged Plaintiff to seek counseling through Lucky's EAP; and that Lucky received doctors' reports diagnosing Plaintiff with stress, depression, and anxiety. This evidence, the Court concluded, was sufficient to permit a reasonable jury to conclude that Lucky "regarded Plaintiff as suffering from a disabling mental condition that substantially limited his ability to work." (Pet. App. at A8.)

The Ninth Circuit gave no rationale for its conclusion. What is clear, however, is that the Ninth Circuit completely overlooked a key part of the analysis, *i.e.,* why Lucky took the actions of which Plaintiff complains. As the Third Circuit Court of Appeals has recently held, "the fact that an employer is aware of an employee's impairment is insufficient to demonstrate either that the employer regarded the employee as disabled or that the perception caused the adverse employment action." *Kelly v. Drexel*

University, 94 F.3d 102, 109 (3d Cir. 1996). *Accord, Aucutt v. Six Flags Over Mid-America,* 85 F.3d 1311 (8th Cir. 1996) (upholding summary judgment for employer where employee failed to show that employer, who had knowledge of employee's impairment, "perceived or treated him as having a substantially limiting impairment").

Lucky took three actions in this case the Plaintiff might argue imposed a limitation on him: it gave him the option between being suspended pending an investigation of the charges against him, or taking a leave of absence and going for EAP counseling; it terminated him following an extended leave of absence; and, it did not rehire him for a store manager position, when none were available. Lucky, however, offered legitimate non-discriminatory reasons for each of these actions. The Ninth Circuit apparently did not consider Lucky's reasons or require any evidence that Lucky's actions resulted from a perception that Plaintiff had a disability. In so doing, the Court either misapplied or misinterpreted, in a manner inconsistent with this Court's ruling in *Arline,* as well as the legislative history and EEOC interpretation, the provision of the ADA protecting individuals regarded as disabled from discrimination.

II. THE NINTH CIRCUIT'S DECISION TO CONSTRUE AN EMPLOYER'S EFFORTS TO ASSIST AN EMPLOYEE, WHOSE BEHAVIOR WARRANTS DISCIPLINE BUT ALSO SUGGESTS THE POSSIBLE EXISTANCE OF AN UNDERLYING PERSONAL PROBLEM, AS EVIDENCE THAT THE EMPLOYER REGARDS THE EMPLOYEE AS DISABLED, IS CONTRARY TO THE INTENT OF CONGRESS AND THE RULING OF THIS COURT IN *SCHOOL BD. OF NASSAU COUNTY V. ARLINE*

In passing the ADA, as with the Rehabilitation Act before it, Congress sought to create equal employment opportunities for individuals with disabilities, and to eliminate the handicapping effects of society's accumu-

lated myths and fears relating to disability and disease. H.R. Rep. No. 101-485, 101st Cong., 2nd Sess., pt. 2, at 53 (1990), *reprinted in*, 1990 U.S.C.C.A.N 303, 335; H.R. Rep. No. 101-485, 101st Cong., 2nd Sess, pt. 3, at 22 (1990); S. Rep. No. 101-116, 101st Cong., 1st Sess. 24 (1989). Congress hoped and expected that passage of the ADA would result in greater inclusion of disabled individuals in the workplace. *Id.* Toward that end, Congress imposed affirmative requirement on employers that go beyond mere equal treatment. Namely, Congress incorporated into the ADA a requirement that employers provide reasonable accommodation to individuals with disabilities. 42 U.S.C. § 12112(b)(5)(A). In so doing, Congress expressed a policy that employers have a role in helping create opportunities to enable individuals with disabilities to work. Benign neglect would no longer be acceptable. Indeed, it would be unlawful.

Cognizant that ignorance and fear about disabilities—real or imagined—also leads to discrimination, Congress included within the definition of disability individuals regarded as disabled. 42 U.S.C. 12102(2); H.R. Rep. No. 101-485, 101st Cong., 2nd Sess., pt. 2, at 53 (1990), *reprinted in*, 1990 U.S.C.C.A.N. 303, 335; H.R. Rep. No. 101-485, 101st Cong., 2nd Sess., pt. 3, at 29-30 (1990), *reprinted in*, 1990 U.S.C.C.A.N. 445, 452-453; S. Rep. No. 101-116, 101st Cong., 1st Sess. 23-24 (1989). In so doing, Congress explicitly adopted the rationale set out in *Arline*.

The case at bar presents circumstances totally unlike those described in the various sources, including *Arline*, that explain the purpose and meaning of the "regarded as provision." As discussed in detail in the previous section, the provision was aimed at eliminating the ill effects of ignorance, fear, stereotyping, and the like, relating to disabilities that result in lost employment opportunities for individuals. In contrast, the employer in the instant case took an enlightened, sensitive, and affirma-

tive approach—just what the ADA seeks—to addressing an employee's behavior problem. Before suspending Plaintiff, Lucky first gave him the benefit of the doubt by transferring him to another store for a fresh start. Then, when a new rash of complaints were registered, Lucky offered the Plaintiff a chance to obtain counseling from the company EAP in lieu of being suspended. Lucky permitted Plaintiff to use over six months of leave before it fired him, and even offered to rehire Plaintiff, when Plaintiff subsequently reapplied.

Lucky was not acting on an assumption or stereotype relating to disability, but, as the undisputed record evidence reflects, on dozens of employee complaints about Plaintiff's disruptive, improper, and sometimes violent behavior. Lucky was not acting to limit Plaintiff's opportunities for work when it addressed the complaints with Plaintiff and later offered to rehire him, but rather to preserve them. When Lucky fired Plaintiff, it was only because Plaintiff himself indicated he could not return to work. In a case presenting facts similar to these, one district court granted summary judgment to the employer and observed,

> This suit flies in the face of the policy concerns underlying the ADA because it encourages employers to dehumanize their relationship with their employees for fear that showing concern for and recognizing their employees' emotional problems would land them in court facing a discrimination claim based upon a perceived mental disability.

Johnson v. Boardman Petroleum Inc., 923 F. Supp. 1563, 1568 (S.D.Ga. 1996).

The clear message the Ninth Circuit's decision sends to employers faced with the circumstances presented here is: do not show concern, do not try to help, and do not give the employee a chance to obtain any assistance he or she might need, lest you might be deemed to have

regarded the employee as disabled; instead, simply impose discipline. This result is contrary to the intent of Congress in passing the ADA and the spirit of the Act.

III. THE NINTH CIRCUIT'S RULING CREATES A STRONG DISINCENTIVE FOR EMPLOYERS TO ATTEMPT TO ASSIST, THROUGH REFERRAL TO EAPS OR OTHERWISE, EMPLOYEES DEMONSTRATING SIGNS OF PERSONAL PROBLEMS, THEREBY DIMINISHING VALUABLE OPPORTUNITIES FOR SUCH EMPLOYEES TO GET HELP

When an employee commits misconduct on the job, the employer must decide how to respond. The employer's options include taking no action, addressing the reasons for the misconduct and offering assistance, or simply imposing discipline, up to and including termination. If the employer takes no action, the problem may fester and grow, particularly where, as here, the employee's conduct negatively effects others. If the employer imposes discipline without addressing the underlying causes of the misconduct, the employer may face the same problem again, and may eventually have to discharge an employee who could have been turned around had the employee received timely assistance. In such instances, both parties in the employment relationship suffer: the employee loses a job and a chance to rehabilitate, and the employer loses a once valued employee.

Many employers offer, as a benefit of employment, access to a company-paid internal or external Employee Assistance Program (EAP). EAPs "provid[e] counseling and training to assist employees in the identification and resolution of personal problems, which may include referrals to specialists for treatment." *Directory of Employee Assistance Program Vendors*, Business Insurance, June 26, 1995, at 12-13. A 1993 survey indicates that roughly 87% of employers offer EAPs for their employees. *Mental and Physical Health Programs Prolif-*

erate, HR Focus, May 1995, at 12. EAPs provide employees assistance with a variety of personal problems, including family or marital problems, grief and loss, stress management, workplace concerns, workplace and domestic violence, mental health, legal problems, child or elder care concerns, and substance abuse, according to industry surveys. *EAPs Broaden Their Horizons*, HR Focus, July 1995, at 6; Bernice Caldwell, *EPAs: Survey Identifies Uses*, Employee Benefit Plan Review, December 1994, at 36; Sharon A. Haskins and Brian H. Kleiner, *Employee Assistance Programs Take New Directions*, HR Focus, January 1994, at 16; *Intervention at Work*, Working Woman, February 1995, at 56.

Among the benefits of EAPs is that they "provide a user-friendly, barrier-free, entry point to behavioral health services." *Changed Workplace Expands Role of EAPs*, Employee Benefit Plan Review, December 1994, at 38. As such, they provide help to those who might not otherwise receive it.

Given these alternatives, it makes sound business sense for an employer faced with employee misconduct, particularly that which is out of character for an employee, to consider the possibility that such conduct is being caused by a personal problem and attempt to help the employee obtain appropriate assistance to address the problem. EAPs are ideally suited for this very purpose.

Should the Ninth Circuit's ruling stand, many employers will likely cease referring employees to EAPs altogether, recognizing that the mere act of making such a referral may subject them to ADA liability. A valuable resource will thereby be lost to their employees.

The magnitude of that loss may never be known with certainty. But what is clear is that many people who would have been helped, will not be. Employees in need of grief management may not get it. Whereas the Plaintiff in this case obtained a diagnosis and treatment for his

problems through the EAP, those in his wake may not do so. Women who suffer from domestic violence may not receive the counseling and referrals that may save their lives. Everything that EAPs offer employees—from improved well-being, to an opportunity to save a job, to a new shot at life—is placed in jeopardy by the Ninth Circuit's ruling.

And, it is not only EAPs that are jeopardized. Under the Ninth Circuit's ruling, it appears that any employer inquiry into the reason for an employee's abberational behavior or inappropriate conduct, or any effort by the employer to direct the employee toward obtaining assistance in connection with whatever might be causing the behavior or conduct, may suffice to establish that the employer regards the employee as disabled. Accordingly, some employers may cease efforts to help employees altogether. Such a result is antithetical to the spirit and purpose of the ADA and totally unnecessary.

CONCLUSION

For the foregoing reasons, the *amicus curiae* EEAC respectfully requests that the Court grant certiorari in this case.

Respectfully submitted,

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December 5, 1996

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No. 96-723

Supreme Court, U. S.
FILED
JAN 2 1997
CLERK

In The

Supreme Court of the United States

October Term, 1996

LUCKY STORES, INC.,

Petitioner,

vs.

RICHARD HOLIHAN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Should this Court grant certiorari to review the Ninth Circuit's decision which is based on an analysis of specific facts and is not in conflict with other circuits concerning the "regarded" issue under the American With Disabilities Act?

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STATEMENT OF FACTS

Petitioner hired Richard Holihan as a journeyman clerk on February 15, 1966. He advanced to the position of 4th clerk or night manager in 1969. In February, 1976, after a series of promotions, Lucky promoted Holihan to the position of store manager. Holihan served as a store manager for the following seventeen years at a number of stores winning numerous awards as an outstanding profit producer for Lucky. In mid-1992, Lucky conferred upon Holihan the unique distinction of being recognized as their all-time top profit producer. Lucky held Holihan in such high esteem that it chose him to be its representative at the prestigious DECA national marketing seminar held in Anaheim, California in May 1992.

In July, 1992, Mark Church, the district manager, summoned him to his office to discuss a perceived "problem." Church's resolution of the perceived problem was to transfer Holihan to a smaller store where he would have a less stressful environment. On October 22, 1992, Church again summoned Holihan to his office and informed him that he definitely had a problem. He offered Holihan three choices, the first of which (return to the store) Church immediately ruled out, and said that Holihan could take an indefinite suspension without pay, or could voluntarily accept treatment through the Employee Assistance Plan. Church took Holihan's store keys away and Holihan was forced to seek treatment through the Employee Assistance Plan ("EAP").

Holihan was treated by Dr. Strickler, Ph.D., who is retained through Lucky's EAP, and he immediately placed Holihan on a medical leave of absence. Subsequently, Lucky next selected Dr. Robert D. McDaniel, to examine Holihan. Dr. McDaniel diagnosed Holihan as suffering from "organic mental syndrome", a physical disease. From the date that Holihan was

forced to take a medical leave of absence until he was cleared to return to work by his treating physician in August 1993, Holihan was receiving medical treatment for his mental impairment.

On or about May 15, 1993, Holihan was cleared to return to work by his treating physician. He notified Lucky by certified mail on May 25, 1993 that he would be available for work on August 1, 1993. On May 28, 1993, Lucky notified Holihan that he would be terminated from his employment effective June 1, 1993. Lucky's alleged reason for termination was the fact that Holihan exceeded the six month leave time. However, Lucky did not have a written leave policy applicable to Holihan. Holihan was never aware or advised that he would be terminated if he was out on medical leave of absence for longer than six months.

REASONS FOR DENYING THE WRIT

I.

THE NINTH CIRCUIT'S ANALYSIS UNDER THE AMERICANS WITH DISABILITY ACT IS IN HARMONY WITH THE OTHER CIRCUITS.

A. The Circuits Are Not Split.

The Petitioner alleges that there is a split among the circuits on the issue of being regarded as having a disability; however, this is not the case. There are no cases cited that show a conflict in this section of the Americans With Disabilities Act ("ADA"). The cases cited by the Petitioner all demonstrate how the particular facts of a case must be applied to the ADA to reach a decision. This does not demonstrate a conflict, because all cases are factually based. The same law is applied in all the circuits, it is only the facts of each case that are different.

Petitioner uses the following cases to demonstrate its incorrect position that there is a split among the circuits in this area of the law. Specifically, whether the courts analyzed if the perceived disability substantially limited the major life activity of "working". Petitioner alleges that the Ninth Circuit failed to examine whether Petitioner regarded Holihan as being substantially limited in his ability to work. 95-55409 Pet. App. 12. The following cases that the Petitioner relied upon demonstrates that the Ninth Circuit is in harmony with the other circuits.

1. *Runnebaum v. Nationsbank of Maryland*, 95 F. 3d 1285 (4th Cir. 1996):

In *Runnebaum,* the Fourth Circuit reviewed the facts of the case and decided that there was sufficient evidence to show that the employer perceived the employee as having an impairment that substantially limits a major activity. Specifically, the Fourth Circuit found, "Upon learning of Runnebaum's condition, a bank supervisor, Michael Brown, felt "panicky" and "uncontrolled" and believed death might be imminent for Runnebaum. This is enough to show at the summary judgment stage that the bank perceived Runnebaum as having an impairment that substantially limits a major life activity." *Runnebaum* at 1290.

Likewise, the Ninth Circuit in *Holihan* reviewed the facts of the case and found there was sufficient evidence for a jury to find that petitioner regarded Holihan as suffering from an disabling mental condition that substantially limited his ability to work. "Lucky called Holihan into two separate meetings to discuss his aberrational behavior. At one of these meetings, Lucky District Manager Church asked Holihan if he was having any "problems;" at the other, Church strongly encouraged Holihan to seek counseling through Lucky's EAP. Lucky also received several doctors' reports diagnosing Holihan with

depression, anxiety and stress, including the reports of Drs. Strickler and Cramer. From these facts, a reasonable jury could infer that Lucky regarded Holihan as suffering from a disability mental condition that substantially limited his ability to work." *Holihan v. Lucky Stores, Inc.*, 87 F.3d 362, 366 (9th Cir. 1996).

2. *Daley v. Koch,* 892 F.2d 212 (2d Cir. 1989):

The Petitioners are also incorrect in its statement that the Second Circuit conflicts with this decision by the Ninth Circuit. There is no split in these decisions. In *Daley v. Koch*, the Fourth Circuit found that when there is specific criteria for a position of a police officer and the applicant fails the test and is found to have personality traits that make him unsuitable for the position of a police officer, that does not mean that the employer regarded the applicant as having a disability. *Daley* at 215-216. The facts of the *Daley* case are distinguishable from the present case. These decisions are based upon entirely different aspects of the ADA. This case does not deal with an application for a job with specific nondiscriminatory requirements that must be met prior to being offered the job.

3. *Kocsis v. Multi-Care Management,* 97 F.3d 876 (6th Cir. 1996):

In *Kocsis v. Multi-Care Management,* there are no facts submitted by the plaintiff to indicate that the employer perceived her to have a disability in being unable to care for herself or to perform all the duties of her job. The court found that plaintiff's job title and some of her duties changed, her pay and benefit remained the same as or better than those she previously received. "Moreover, Kocsis' doctors reported that she was not limited in her activity and that she, consequently, did not need any accommodations." *Kocsis* at 883, 886. The Sixth Circuit's analysis is entirely consistent with other decisions and in

particular, the Ninth Circuit's decision in this case. There is no conflict.

4. *Stewart v. County of Brown,* 86 F.3d 107 (7th Cir. 1996):

In *Stewart,* the 7th Circuit held that just because the employer concluded that the plaintiff was temperamentally unfit to serve as a sheriff's deputy, this does not amount to a showing even of a perception of a mental impairment that substantially limits one or more of the major life activities. The plaintiff stated in his deposition, "this boils down nothing more than personalities." The Seventh Circuit agreed with this conclusion. *Stewart* at 111. This issue was not addressed in the Ninth Circuit's opinion in the *Holihan* case.

B. The facts in each case are different, the decisions are different, however, analysis by each circuit is the same.

There is no split in the circuits nor do any of the decisions of the other circuits conflict with this decision of the Ninth Circuit. The courts are not divided on the issue of whether the perception of an employer is actionable under the ADA. It is a matter of applying the facts of each individual case to the law and that is exactly what each case in each circuit has done. These are factual issues, not conflicts in the application of the ADA.

The analysis under the ADA of whether the employer regarded the employee as being substantially limited in a major life activity focuses not on the employee and his actual abilities, but rather on the reactions and perceptions of the persons interacting or working with him. 2 *EEOC Compliance Manuel* § 902, at 902-3 to 902-4. The Ninth Circuit, along with the other circuits, followed this analysis in determining whether or not petitioner regarded Holihan as being substantially limited in a major life activity.

II.

THIS CASE IS INAPPROPRIATE FOR REVIEW BY THIS COURT BECAUSE IT IS STRICTLY BASED ON THE ANALYSIS OF FACTS APPLIED TO LAW.

The Americans With Disabilities Act contemplates a case-by-case determinations of whether a given impairment substantially limits a major life activity. *Runnebaum, supra* at 1290. The courts are obligated in reviewing a grant of summary judgment to view the facts in the light most favorable to the non-moving party. The Ninth Circuit reviewed the facts of this case and decided that the facts created a genuine issue of material fact as to whether petitioner regarded Holihan as disabled within the meaning of § 12102(2)(C) of the ADA. The Ninth Circuit also noted that, "on the other hand, the record also contains facts which might lead a trier of fact to conclude that Lucky did not regard Holihan as disabled." *Holihan, supra* at 366.

Because the *Holihan* case is fact bound, the Ninth Circuit's decision is only applicable to other cases with the same or similar facts.

III.

THE QUESTION PRESENTED BY THE PETITIONER RELATING TO AN EMPLOYEE'S ASSISTANCE PROGRAM WAS NOT ADDRESSED BY THE NINTH CIRCUIT'S DECISION.

The Petitioner is attempting to mischaracterize the grounds for the decision below — the grounds for the reversal of the district court decision was that the Ninth Circuit found that a reasonable jury could infer that Lucky regarded Holihan as suffering from a disabling mental condition that substantially limited his ability to work. *Holihan, supra* at 366.

The Petitioner is trying to make this case less fact bound and is attempting to characterize the Ninth Circuit's decision as resting on the broader ground of destroying an employer's ability to refer employees to its Employee Assistance Programs ("EAP") for fear of a lawsuit under the ADA.

The question presented by the Petitioner in its petition is simply not implicated in this case. This case strictly involves the application of § 12102(2)(C) of the ADA to the specific facts of this case. The petitioner is attempting to raise a general and widespread question concerning an employer's EAP, however, there is no basis for this issue. The issue of destroying the EAP throughout the nation is a red herring to distract from the real issues of this case. Holihan was referred to Petitioner's EAP because it had such a program, however, Holihan could have been referred to his personal physician under his HMO. If he had been referred to his HMO, would the issue be the same? It was the manner how the employer (petitioner) treated Holihan and forced him out of his employment, not the fact that he was referred to the company's EAP.

CONCLUSION

Holihan respectfully requests that this petition be denied because there is no conflict in the circuits and this case is fact bound.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JAN 10 1997
CLERK

No. 96-723

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5 pp

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INTRODUCTION

This supplemental brief is filed under Rule 15.7 of the Supreme Court Rules and calls attention to the Eighth Circuit's opinion in Webb v. Mercy Hospital, 1996 WL 714829 (8th Cir. 1996). This decision was issued on December 13, 1996. Petitioner's brief was filed on November 5, 1996. This supplemental brief is filed in furtherance of Petitioner's continuing duty to inform the Court of any developments which may conceivably affect the outcome of the Petition. See, Board of License Commissioners of Tiverton v. Pastore, 469 U.S. 238 (1995).

DISCUSSION

In Webb, plaintiff worked as a weekend nurse at a hospital. 1996 WL 714829 at 1. In December of 1992, Webb's schedule was changed so that she would not have to work the night shift. Id. The change was precipitated by a note from Webb's doctor stating that she should not work the night shift to avoid fatigue. Id. After several months, Webb was asked by her employer to again work the night shift. Id. Webb discussed her objections to Mercy's request with other employees and stated that she understood why someone, who had recently been in the news, had killed several people. Id. She also threatened co-workers with legal proceedings. Id. Webb was reprimanded for disruptive and insubordinate behavior and was told she **must** participate in employee assistance program counseling or she would be fired. Id. Webb was subsequently terminated for appearing at the hospital shortly after having been told not to come to the hospital

until further notice. Id. For two weeks following the termination of Webb, the hospital hired a private security guard for the hospital. Id.

Webb sued the hospital and her supervisors under the Americans With Disabilities Act ("ADA") on a perceived mental impairment theory. Id. Webb argued that she was regarded as suffering from a substantially limiting mental impairment because she had previously been diagnosed as depressed and because of the hospital's response to her recent behavior. Id. In upholding the district court's grant of summary judgment for the hospital, the Eighth Circuit stated that "a person is regarded as having an impairment that substantially limits major life activities when others treat that person as having a substantially limiting impairment." Id. at p. 2. The Court further noted that "an employer's knowledge that an employee exhibits symptoms which may be associated with an impairment does not necessarily show that the employer regarded the employee as disabled." Id. Moreover, in language that explicitly places the opinion at loggerheads with the Ninth Circuit's opinion in Holihan, the Court stated that "although Webb's supervisors testified she was a difficult and insubordinate employee, that does not establish that she was considered mentally impaired." Id. Thus, "without evidence that Mercy or [its] supervisors regarded her as mentally disabled or acted on such a perception, her ADA claim cannot go forward." Id. In Holihan, the Ninth Circuit by contrast, held that because Lucky Stores knew Holihan had "problems" and was stressed from work, it may have ipso facto regarded him as disabled.

The employer acknowledged in Webb that plaintiff was in need of counseling and indeed ordered her to participate in an EAP sponsored counseling program, quite similar to Lucky's suggestion that Holihan seek help through its EAP program. Yet the Eighth and Ninth Circuits reached irreconcilable results when presented with virtually identical circumstances. While the Ninth Circuit suggests that an EAP referral is sufficient to trigger "regarded as" liability under the ADA, the Eighth Circuit result indicates that not even an employer mandating that an employee seek EAP assistance triggers such liability.

CONCLUSION

For the above-stated reasons, it is requested that the Court consider Webb v. Mercy Hospital when deciding whether to grant Petitioner's Petition for Certiorari, and that such Petition be granted.

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